THE RECORD
OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

EDITORIAL BOARD

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Association Activities

AT THE Stated Meeting of the Association on March 8, there will be a discussion on the proposals of The Temporary Commission on the Courts for additional Supreme Court Justices in the First and Second Judicial Districts. Fifield Workum, Chairman of the Committee on the Bill of Rights, will present a report which is published in this issue of THE RECORD on "Book Burning." An interim report will be received from Edwin A. Falk, Chairman of the Special Committee on the Federal Courts.

THE ANNUAL Association Night Show will open on March 29 and play for four nights. The show is entitled "Quick Henry, the Writ!" Judge Arthur Markewich is Chairman of the Entertainment Committee and Samuel G. Fredman is the producer of the show.

PERCIVAL E. JACKSON, a member of the Association since 1934, has presented to the Association of the Bar of the City of New York Fund, Inc., an extremely rare set of thirty-nine lithographs by Honore Daumier entitled "Les Gens de Justice." The prints

will be temporarily exhibited on the first floor of the House of the Association.

THE COMMITTEE on Taxation, John H. Alexander, Chairman, has released a comprehensive report on proposed revisions of the Internal Revenue Code. Copies of the report may be secured from the office of the Executive Secretary.

IN FEBRUARY the Committee on Foreign Law, Willis L. M. Reese, Chairman, joined with the American Foreign Law Association, Otto C. Sommerich, President, in sponsoring a discussion on "Civil Law Influences on Common Law." The speakers were Judge Jerome N. Frank and Phanor J. Eder, past President and one of the founders of the American Foreign Law Association.

THE OPENING of the Photographic Show on March 3 was well attended. The Show was sponsored by the Committee on Art, John W. Thompson, Chairman. Joseph G. Blum was the Chairman of the Subcommittee in charge of the exhibition. The Art Committee has announced that the Annual Exhibition of oil paintings, water colors and drawings will open on May 3.

THE COMMITTEE on Insurance Law, Wayne Van Orman, Chairman, is preparing a report on the subject of the manufacture and use of fissionable materials as they affect the insurance industry.

PRESIDING JUSTICE PECK and the Associate Justices of the Appellate Division met with representatives of community groups and members of the Bar at the House of the Association on March 3. The Presiding Justice discussed problems relating to the improvement in the administration of justice. The meeting was sponsored

by the Committee on Modern Courts of which Edwin F. Chinlund is the Temporary Chairman.

AT ITS MARCH meeting the Committee on Admiralty, William G. Symmers, Chairman, had as guests Clarence G. Morse, General Counsel, Federal Maritime Administration, and Archie M. Stevenson, Chairman of the Committee on Admiralty and Maritime Law of the American Bar Association.

RAYMOND G. MCCARTHY, Director of Alcoholism Research for the New York Mental Health Commission, was a guest at the January meeting of the Committee on Medical Jurisprudence, Julius Isaacs, Chairman. Mr. McCarthy discussed modern trends in the treatment of alcoholism and the results of research conducted by the Commission.

THE DEAN of the Law School of the University of Ceylon, T. Nadaraja, was the guest of the Committee on Foreign Law, Willis L. M. Reese, Chairman, and discussed with the committee legal education and the practice of law in Ceylon.

The Committee on Foreign Law has recommended that the Trading with the Enemy Act of 1917, as amended, be amended as follows:

> That Section 33 of the Trading with the Enemy Act of October 6, 1917, as amended (50 App. U.S.C.A. § 33), should be amended by eliminating the words "after April 30, 1949" in the second sentence thereof and substituting in lieu thereof the words "after April 30, 1956."

Section 33 of the Trading with the Enemy Act of October 6, 1917, as amended by Public Law 292 (S. 373), approved February 9, 1954, which extended the time for the filing of claims for the return of property under the Trading with the Enemy

Act, failed to provide an extension of time for the bringing of a suit on claims thus filed, and the proposed amendment supplies the gap.

THE PRESIDENT of the Association appeared at a public hearing in Albany held by the Committees on the Judiciary of the Senate and Assembly. Mr. Klots spoke on behalf of the proposal for a Judicial Conference made by The Temporary Commission on the Courts. On February 24 Roy M. D. Richardson, Chairman of the Executive Committee, represented the Association before the Assembly Ways and Means Committee which was considering legislation supported by the Association which would create a temporary commission to study laws relating to the family. Richard H. Wels, Chairman of the Association's Special Committee on Improvement of Family Law, also testified in support of the legislation.

THE COMMITTEE on Real Property Law, Albert W. Fribourg, Chairman, met in January with Charles Abrams, the new Chairman of the State Rent Commission, and members of his legal staff.

OTTO C. SOMMERICH has called the attention of THE RECORD to "A Diary With Letters 1931–1950" by Thomas Jones (Oxford University Press, London, 1954). The diary is the personal record of Dr. Jones, for many years Deputy Secretary to the English Cabinet. He worked closely with Lloyd George, Bonar Law, Stanley Baldwin and Ramsay MacDonald. Mr. Sommerich has made selections from the book as follows:

Under date of March 8, 1936, the following account of a talk with Toynbee is related (p. 181):

> "I went this morning for a walk with Toynbee, most of the others going to play golf. Toynbee has just returned

from a visit to Germany where he lectured at Bonn, Berlin, and Hamburg. He had an interview with Hitler which lasted one-and-three-quarter hours. He is convinced of his sincerity in desiring peace in Europe and close friendship with England,***."

The writer also narrates several visits to Hitler, one alone, and two others in the company of David Lloyd George: under date of May 17, 1936, referring to his visit to Hitler, the author states (p. 201):

"He repeated, with much animation and elaboration, his objections to attempting grandiose undertakings divorced from reality, urged the importance of an alliance with England,***."

He also relates a conversation with Hitler on September 5, 1936, at which the author was present (p. 250):

"Lloyd George, speaking with a tear in his throat, was deeply touched by the personal tribute of the Fuehrer and was proud to hear it paid to him by the greatest German of the age."

Dr. Jones was a great friend of many Americans, such as John W. Davis, whom he describes in one of his letters as follows (p. 235):

"Do you remember John W. Davis, who followed Page as Ambassador at the end of the War? Tall, cleanshaven, with a cherubic countenance and fresh complexion in sharp contrast to the parchment skins of so many Americans. He is a good talker, a sound lawyer, and against Roosevelt because he has multiplied the functions of government so recklessly."

THE FOLLOWING Sections of the Committee on Post-Admission Legal Education held meetings in February:

Section on Corporate Law Departments, E. Nobles Lowe, Chairman, in cooperation with the Section on Jurisprudence and Comparative Law, the Honorable Samuel C. Coleman, Chairman. The speaker was James N. Hyde and his topic was, "What the Activities of the United Nations Mean to American Corporations."

Section on Wills, Trusts and Estates, Albert Mannheimer, Chairman, had as speakers at its meeting Milton Young and Dwight Rogers. Mr. Young spoke on "New Code Provisions as to Redeeming or Buying Out Decedent's Stock Interest in Close Corporations." Mr. Rogers' topic was "Gifts Under the 1954 Revenue Code."

The Section on Taxation, R. Palmer Baker, Jr., Chairman, had as its topic "Partnerships Under the Internal Revenue Code of 1954." The speaker was Paul Little.

James A. Sweet discussed "Some Legal Aspects of Trust Indentures" before the Section on Corporations, George A. Brooks, Chairman.

THE UNION Internationale des Avocats will hold a conference in Paris in 1956, July 16–22. Members of the Association are invited to attend the conference. Further details will be announced later.

The Calendar of the Association for March and April

(As of February 28, 1955)

March	1	Dinner Meeting of Committee on Admiralty Dinner Meeting of Committee on Insurance Law Meeting of Committee on State Legislation Dinner Meeting of Committee on Studies and Surveys of Administration of Justice
March	2	Dinner Meeting of Executive Committee Meeting of Section on Wills, Trusts and Estates
March	3	*Opening of Photographic Show, 4:30 P.M.* Meeting of Section on Jurisprudence and Comparative Law
March	7	Dinner Meeting of Committee on Federal Legislation Dinner Meeting of Committee on Medical Jurisprudence Dinner Meeting of Committee on Professional Ethics Dinner Meeting of Committee on Real Property Law
March	8	*Stated Meeting of Association, 8 P.M. Buffet Supper, 6:15 P.M.* Meeting of Committee on State Legislation
March	9	Dinner Meeting of Committee on Copyright Dinner Meeting of Committee on Domestic Relations Court
March	10	*Meeting of Section on Labor Law, 8 P.M. Speaker—Hon. James P. Mitchell, Secretary of Labor. Buffet Supper, 6:15 P.M.* Meeting of Merrill Foundation Committee on United States Antitrust Laws and Foreign Trade
March	14	Meeting of Section on Corporate Laws
March	15	Meeting of Committee on City Courts Meeting of Committee on State Legislation

March 16 Meeting of Committee on Admissions
Meeting of Committee on Arbitration
Dinner Meeting of Committee on Courts of Superior Jurisdiction
Dinner Meeting of Committee on Foreign Law
Round Table Conference, 8:15 P.M. Guest to be announced.
Meeting of Committee on Trade Regulation and Trade Marks

March 17 Dinner Meeting of Committee on Municipal Affairs
Meeting of Section on Administrative Law and Procedure

March 21 Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Meeting of Library Committee

March 23 Dinner Meeting of Committee on Aeronautics
Dinner Meeting of Committee on Bill of Rights
Meeting of Section on Corporations

March 28 Dinner Meeting of Committee on Military Justice

March 29 *Tenth Annual Association Night, 8:30 P.M.*

March 30 *Tenth Annual Association Night, 8:30 P.M.*

March 31 *Tenth Annual Association Night, 8:30 P.M.*

April 1 *Tenth Annual Association Night, 8:30 P.M.*

April 4 Dinner Meeting of Committee on Federal Legislation
Dinner Meeting of Committee on Professional Ethics
Dinner Meeting of Committee on Real Property Law

April 5 Dinner Meeting of Executive Committee
Meeting of Section on Wills, Trusts and Estates

April 11 Meeting of Section on Trade Regulation

April 13 Dinner Meeting of Committee on Legal Aid

April 14 Meeting of Section on Taxation

April 18 Dinner Meeting of Committee on Bankruptcy and Corporate Reorganizations
Meeting of Section on Corporate Law Departments
Meeting of Library Committee
Dinner Meeting of Committee on Medical Jurisprudence

April 19 Dinner Meeting of Committee on Bill of Rights
Dinner Meeting of Committee on Insurance Law

April 20 Meeting of Committee on Admissions
Meeting of Committee on Arbitration
Meeting of Section on Corporations
Meeting of Committee on Domestic Relations Court
Dinner Meeting of Committee on Courts of Superior Jurisdiction
Round Table Conference, 8:15 P.M. Guest to be announced

April 21 Meeting of Section on Litigation

April 26 *Fourteenth Annual Benjamin N. Cardozo Lecture. 8 P.M. Speaker—Harrison Tweed, Esq. Buffet Supper, 6:15 P.M.*

April 28 Meeting of Section on Trade Regulation
Dinner Meeting of Committee on Trade Regulation and Trade Marks

The President's Letter

To the Members of the Association:

I wish it were possible to review in this letter the activities of all our committees which have faithfully been carrying on the work of the Association this winter in all its many facets. But I can only undertake here to give you some of the highlights which may be of general interest.

A topic in which we have been particularly interested and active is the matter of the reform of the judicial structure of this state. This is now being officially considered by The Temporary Commission on the Courts created by the Legislature some two years ago, of which Harrison Tweed is Chairman. Due to the foresight of your former President, Beth Webster, a committee of this Association was appointed in November 1952 charged with the duty of conducting studies of the administration of justice in the State of New York, and it has had as its particular objective the preparation and furnishing of material for presentation to The Temporary Commission. Edward S. Greenbaum was Chairman of the committee until last spring and was then succeeded by Francis H. Horan, who is now Chairman.

As one of its first projects this committee undertook a study and the preparation of a report on the need for an administrative office supervised and directed by a Judicial Conference to undertake the business management and executive direction of the courts of the state. The report of our committee on this subject was released last month in a volume entitled "Bad Housekeeping—The Administration of the New York Courts." Copies were supplied to the Temporary Commission and representatives of the committee have appeared in support of our proposals. The Temporary Commission introduced into the Legislature last month a bill providing for a Judicial Conference. This bill, in the view of our committee, although a step in the right direction, falls short of meeting the need because it fails to give any real authority to the Judicial Conference. We have nevertheless sup-

ported the bill before the Legislature but have urged strengthening amendments. Our committee is continuing its work and plans later to publish its views on additional topics such as a unified court structure for the entire state, the rule-making power, streamlining of present court procedures and improvement in the methods of selecting judges.

Our Association has learned from long experience that many of the most worthy projects, which we as lawyers have initiated or stood behind, have failed to materialize because of the lack of general public interest and support. We have, therefore, undertaken the formation of a citizens group drawn from the various citizens organizations in the city and state in an effort to broaden the public support for some of the important measures to be proposed. This citizens committee is known as the "Committee for Modern Courts." An important meeting under the auspices of this committee was held at the House of the Association on Thursday, March 3rd, which was attended by Presiding Justice Peck and the Associate Justices of the Appellate Division of the Supreme Court, First Department. Various problems of the courts were discussed and explored.

A very important project which your Association has undertaken is a study of the Federal loyalty-security practice and program. This study will be in charge of a committee which will include members of this Association from the New York Bar and, in addition, leading representatives of the bar from other parts of the country. This committee will have the benefit of a generous grant from The Fund for the Republic, Inc., which will make possible the organization of a competent research staff to assist the committee in its work.

The announcement that a study of this timely and important subject was to be undertaken under the auspices of the Association has already received wide approval not only in the press throughout the country but also in official circles in Washington. The President of the United States has publicly stated that he welcomed such a study to be made by a committee of this Association. It is expected that the names of the members of the

committee now in the process of formation will have been announced by the time this letter is published.

After the Stated Meeting of the Association in October, when the qualifications of candidates for judicial office were voted upon, many communications were received raising the question of whether any improvement could be made in our procedures in this matter. We held meetings of the chairmen of our various judiciary committees to review the whole problem and at the Stated Meeting in January we held a panel discussion in open meeting. The topic of the meeting was how the Association can best contribute to the maintenance of high standards in the nomination and qualification of judicial candidates. Three former presidents of this Association acted as the panel and the chairmen of our various judiciary committees and numerous other individual members participated in the discussion from the floor. The meeting was intended merely as a review and an analysis of the problem leading to further study and no definitive action was taken. One of the outstanding features was a general feeling of regret that the political leaders in this city have not found it possible in the case of elective offices to submit the names of possible candidates for comment before they are put in nomination.

I am particularly pleased to state that in the case of judges appointed by the Mayor of the city, Mayor Wagner has in all cases submitted to us the names of proposed appointees for our views before appointment and he has announced that he will continue to do so. He has, moreover, given heed to the recommendations of our committees.

You will presently see adorning the walls of the Association a valuable collection of Daumier prints entitled "Les Gens de Justice." These are the gift of Mr. Percival E. Jackson and we are duly grateful.

The Entertainment Committee has been as busy as ever preparing for its spring performance. I am sure that those of you who attended the Twelfth Night performance which was given

in honor of Mr. John W. Davis have counted it as one of the memorable occasions in the annals of the Association.

Finally here is a challenge for all you tennis playing barristers and solicitors! The English Bar Lawn Tennis Society (Patron: Her Majesty the Queen) has challenged us to a match and I have had a most cordial correspondence with Lord Dunboyne, the Honorable Secretary of the Society, on the subject. If any of you who plan to be in England together in the near future are ambitious enough to organize a team to take on our British friends, I am sure you will find it a most agreeable adventure.

ALLEN T. KLOTS

February 15, 1955.

REPUBLICAN
A
DEMOCRATIC
B
LIBERAL
C
AMERICAN LABOR
D
SOCIALIST WORKER
E
SOCIALIST DEMOCRAT
F
PROHIBITIONIST
G

EXHIBIT A

The Selection of Judges and the Short Ballot

by Allen T. Klots

I have chosen as my topic this afternoon one which for some time has been the subject of much concern to many thoughtful men and women of this metropolitan community. I am particularly glad to have this opportunity to discuss it before this audience which includes many of you who reside elsewhere within the state and who, perhaps, have not had the problem so forcibly brought home to you as those of us who have been confronted with it here. It is a matter, however, which, I hope, may be of interest to many of us.

Perhaps there is no better way to introduce my subject than to start with Exhibit A. We have here the actual ballot with which a voter in a typical district of Manhattan was confronted last November when he entered his polling booth. You will see that twenty-six vacancies in political offices from the governorship down had to be filled. Twenty-six levers had to be pushed down on the voting machine if the citizen wanted to take part in choosing the persons to fill these vacancies. In selecting the individuals for whom he wanted to vote he had to choose from some fifty-five candidates.

The significant fact for our discussion today is that twenty of these vacancies which had to be filled were vacancies in judicial offices. They included four vacancies on the Court of Appeals, eight vacancies on the Supreme Court, four vacancies on the City Court, two vacancies on the Court of General Sessions and two vacancies on the Municipal Court. If the voter wanted to do his duty he had to vote for twenty judges and to choose them from some thirty-five candidates for judicial office.

How many voters do you suppose knew anything about the qualifications of more than three or four of the candidates for whom they may have voted? Let us be honest with ourselves. The

Editor's Note: Mr. Klots delivered the address published here before the Annual Meeting of the New York State Bar Association on January 25, 1955.

fact is that most of us knew nothing about any of the candidates on the entire ballot except those for governor and perhaps three or four others. We pulled down the other levers in most instances because they were opposite an Eagle or a Star. In fact, many of us left the voting booth with a certain sense of shame and humiliation in the consciousness that we had voted mostly as robots and not as free men exercising an intelligent informed choice. And you may be sure that the candidates for judicial offices were among those for whom we voted automatically.

The foregoing is surely self-evident and hardly needs any verification other than from our own personal experiences. But let us see whether certain facts which have been collected support this conclusion.

The Association of the Bar of the City of New York, in conjunction with the Citizens Committee on the Courts and the Institute of Judicial Administration caused a poll of voters to be taken last autumn between November 6th and November 11th, promptly after election day. A well-known organization skilled in making such an investigation and study was employed for this purpose. Three separate samplings of the voting population were made—in New York City, in the city of Buffalo and in Cayuga County—in other words, the largest city, an upstate city and an upstate semi-rural county. We are making public today the results of this poll.

The facts found fully confirm what we all must have assumed from our own experience. Most of the voters could not recall the names of any of the men for whom they voted in the judicial contests. Even as distinguished a jurist as Judge Albert Conway, who was elected Chief Judge of the Court of Appeals, who was endorsed by both of the major parties and so could have received more votes than any other candidate for office, including the candidates for governor, was remembered by only 1% of the voters in New York City. Of those who voted in New York City only 19% could remember the name of any judicial candidate for whom they had voted and none of them could remember the name of any judicial candidate for whom they had not voted.

Now some of you may say, "Oh, well, that's New York City, but upstate and particularly in our smaller communities we know our candidates for judicial office." Let us see what the poll showed with respect to two localities outside of New York City. In the city of Buffalo not one person who was interviewed could remember that he had voted for Judge Conway, the Chief Judge of the Court of Appeals. With the exception of Judge Desmond, none of the other candidates of the Court of Appeals fared much better. Only 5% of the Buffalo voters remembered voting for Judge Desmond—and he is a Buffalo man. Only 30% of the voters could remember the name of any judicial candidate for whom they had voted.

Now, you may say, "Well, Buffalo is also a large city." Let us take a look at Cayuga County. In Cayuga County only 1% of the voters interviewed could remember having voted for Judge Conway as Chief Judge of the Court of Appeals and only 4% could remember the name of any judicial candidate for whom they voted.

Not only were the voters unable to name candidates they had voted for but most were also unable to name any court that was being contested—80% in New York City; 89% in Buffalo; 86% in Cayuga County.

The method of electing judges directly by popular vote is, of course, one that has great superficial appeal. It is subject to all the familiar arguments which arouse popular emotions: Should not the people be the choosers of those by whom they are to be judged? Are not the people the best qualified to select the best candidates? These and others like them are arguments which demagogic leaders always find ready at hand. The fact is, however, that, certainly in the more populated districts in the state, it is based on an entirely false premise. The premise on which the successful operation of the democratic process must always rest is that the people shall know something about the candidates for whom they are voting. Unless this is so, democracy becomes a pure mockery. Any impression that the people in such communities choose their own judges is pure delusion and any as-

sertion to that effect is pure gibberish. The act of choosing implies a conscious act of the will. The voter does not exercise any real act of choice when he pulls down the lever over the name of a man whom he has never even heard of before he entered the polling booth and whose name he cannot remember the day after he had voted for him.

This ballot, Exhibit A, which you have before you, is typical of the situation in this community. Of the candidates for the twenty vacancies in judicial offices, except for those who happen to be judges running for reelection, most of the candidates were entirely unknown to most of the voters at the election. These candidates, chosen by the political leaders of New York City, were in most instances unknown even to most members of the bar of the city. The most that the average voter knew about the average candidate was possibly that he had seen his photograph pasted on a billboard or in some shop window under the party emblem. Under such conditions any assertion that the people choose their own judges has no relation to reality.

The political philosophy underlying this whole topic was thrashed out in this state in the early years of this century in a great political debate on a very closely related subject. This was the debate over the political principle known as the "short ballot" and "responsible government." This principle is based on the almost self-evident premise that only those offices should be elective which are conspicuous enough to attract public attention. If the office is one with regard to the candidate for which the people will not take the trouble to inform themselves, they should not be asked to make the choice.

This principle was sponsored by the leading statesmen of both the great political parties. Woodrow Wilson headed the National Short Ballot Association. He once stated: "I believe the short ballot is the key to the whole problem of the restoration of popular government to this country." In New York State in the roster of those who fought for it we find such names as Charles E. Hughes, Theodore Roosevelt, Elihu Root, Alfred E. Smith, Henry L. Stimson and James Wadsworth.

The debate in this state had to do with a short ballot as applied to state offices and became especially active at the time of the Constitutional Convention in 1915. The outcome of that debate proved to be so conclusive and generally acceptable that most of us who were then alive have almost forgotten that it ever occurred and those of us who were not yet living have scarcely heard of it.

Some of us who are old enough will remember that formerly in the state elections we elected not only a Governor and Lieutenant-Governor but also a Secretary of State, State Engineer and Surveyor, State Treasurer, Comptroller and Attorney-General. Leading statesmen of both parties recognized the absurdity of the people being asked to vote for such a long list of candidates, about most of whom the voters knew nothing and were not going to take the trouble to find out anything. A Republican Governor, Charles E. Hughes, in 1910, in his annual message to the Legislature, recommended the reduction in the number of elective officers. Another Republician, James Wadsworth, Speaker of the Assembly, came down from the Speaker's chair to advocate the measure. In 1913, when the Republician Party was trying to recover from the blow which it received in 1912 as a result of the formation of the Progressive Party it adopted the principle of the short ballot as a party program. In 1914 the Democratic Party, led by Alfred E. Smith, came out in favor of the short ballot, although not as short as that recommended by the Republicans. The Constitutional Convention of 1915 recommended the election of only the Governor, Lieutenant-Governor, Attorney-General and Comptroller. The Constitution recommended by that Convention which included a great many other changes was not adopted by the people. In 1919, however, Governor Smith appointed a Reconstruction Commission which reported in favor of the short ballot and subsequently in 1925 the short ballot principle in the election of state executive offices was adopted by the people and is now a part of the Constitution of New York State.

The logic and common sense behind the short ballot is the

very point involved here in the election of judges, namely, that voters should not be asked to vote on candidates about whom they know nothing and as to whose qualifications they are not going to take the trouble to inquire. The words of Governor Hughes in 1910, in his annual message to the Legislature, are as apt in this situation as they were at that time. He said:

> "... The ends of democracy will be better attained to the extent that the attention of the voters may be focused upon comparatively few offices, the incumbents of which can be held strictly accountable for administration. This will tend to promote efficiency in public office by increasing the effectiveness of the voter and by diminishing the opportunities of political manipulators who take advantage of the multiplicity of elective offices to perfect their schemes at the public expense. I am in favor of as few elective offices as may be consistent with proper accountability to the people, and a short ballot."

Equally pertinent are the words of a resolution passed in 1913 at a meeting of 970 Republicans from all parts of the state, wherein it was resolved:

> "That we favor the application to the state government of the principle of the short ballot, which is that only those officers shall be elective which are important enough to attract and deserve public attention;"

The debate came to a focus in the Constitutional Convention of 1915 where the short ballot was vigorously urged and sponsored by such statesmen as Elihu Root and Henry L. Stimson. It is indeed striking how aptly the arguments there made in favor of the short ballot apply to the situation confronting us today in the manner of selecting our judges.

The people of a democracy are neither able nor willing to inform themselves about a multitude of candidates. They can and will inform themselves very thoroughly with regard to the candi-

dates for one or two important offices. With all the instruments for public information now available,—radio, television, commentators and the press—the people can learn a lot about Ike Eisenhower or Adlai Stevenson running for President of the United States or Tom Dewey or Averill Harriman running for Governor of the State of New York, but the people are not interested and will not bother to find out about Joe Doakes and Bill Jones, and maybe a dozen other names which mean nothing to them, running for judges in a particular district.

Because the attention of the voters cannot be fixed on so many candidates and because they are unwilling to take the trouble to find out about them, the whole choice falls on the political leaders, the bosses, or what used to be called the "invisible government." No one has ever put it more effectively than Elihu Root speaking at the Constitutional Convention in 1915 when he said:

> "Whether it be a president appointing a judge, or a governor appointing a superintendent of public works, whatever it may be, the officer wants to make a success, and he wants to get the man selected upon the ground of his ability to do the work. How is it about the boss? What does the boss have to do? He has to urge the appointment of a man whose appointment will consolidate his power and preserve the organization. There has been hardly a day for the last sixteen years when I have not seen those two principles come in conflict. The invisible government proceeds to build up and maintain its power by a reversal of the fundamental principle of good government, which is that men should be selected to perform the duties of the office; and to substitute the idea that men should be appointed to office for the preservation and enhancement and power of the political leader. The one, the true one, looks upon appointment to office with a view to the service that can be given to the public. The other, the false one, looks upon appointment to office with a view to what can be gotten out of it."

Judiciary offices are peculiarly fair game for the bosses. They are rich in patronage and the very fact that they escape close scrutiny by the public offers a rare opportunity to the boss to run a candidate subservient to his wishes. His wishes are usually, as Mr. Root pointed out, the strengthening of his party organization and his own political power rather than the true administration of justice. If the judge becomes the boss's tool in the distribution of patronage, it receives little public attention. The appointment by a judge of his secretaries, receivers, guardians, and referees seldom comes under public examination except in connection with the exposure of a public scandal.

It may be that in some of the less thickly populated communities in this state conditions are different. It may be that the judicial candidates will be known to most of the voters, although the poll recently taken would tend to indicate that this is not universally so. Or it may be, as was stated some months ago in an article in the Bulletin of this Association, that the delegates to the upstate judicial conventions include many leaders of the bar in the respective communities in which they live, that practically every candidate is known to the lawyer-delegates personally, and that candidates of peculiar fitness are uniformly chosen. Unfortunately this is not the result of the nominating process that is carried on in this populous community. The judicial conventions are largely prefunctory affairs, the delegates elected thereto at the primaries are selected by the political leaders and the convention itself serves scarcely more than as a rubber stamp for the choices of those leaders.

You may say that the people ought to take the trouble to inform themselves about all candidates, including the judicial candidates. You may say that the people ought to take the trouble to select the kind of political leaders who truly represent their will. You may say that the people ought to see to it that truly representative and informed delegates to the judicial conventions are elected at the primaries. You may say it is the people's own fault if they do not do so.

Well, unfortunately we have to take the political facts of life

as we find them. We know that people do not take the trouble to find out about all the candidates for whom they are asked to vote and we know that the great majority of the people take little part in the selection of their district leaders. There is too much else in life to occupy them. Of all the candidates, the voters are least interested in the judicial candidates. The average voter does not realize that he has anything but a very remote interest in the election of a good judge. The ordinary citizen very seldom comes in direct contact with the courts. The fact is, of course, that an honest and competent judiciary is vital to any truly free society and successful democracy. But too few of our citizens appreciate the wisdom of the legend inscribed on the portico of the New York County Courthouse that "The true administration of justice is the firmest pillar of good government."

Under the present system it is a wonder that we get as many good judges as we do. The fact is, of course, that we have had and still have many excellent judges, men of high integrity and ability. Unfortunately the results of the system are not uniformly excellent. Hearings of the State Crime Commission held some months ago, conducted not only in New York City but in other parts of the state, served to focus public attention on some of its defects. These hearings revealed to the people of New York State the sordid picture of nominations for judicial office being put up for sale to the highest bidder and the criterion of the candidates' qualifications being not his fitness for office but the money that he is willing to put into the coffers of the political boss. Nor is it surprising that judges chosen for such qualifications in certain instances have been found to be not above selling their favors after being elected.

The alternative to the selection of judges by popular election is, of course, to put the responsibility for their selection upon some officer elected by the people, whose office is sufficiently conspicuous to have enlisted the people's interest in his candidacy and whose qualities the people have taken the trouble to appraise. The appointive system of selecting judges is not a new and untried method. Let us not forget that the founders of our

republic, in drafting the Constitution of the United States which has served us well for all these generations, adopted the principle of the short ballot, responsible government and an appointed judiciary. The people vote for the President and Vice-President of the United States. They do not vote for the Secretary of State, the Attorney-General, the Secretary of Defense or any other members of the Cabinet. The responsibility for the selection of his team is left to the President, a candidate about whom the people are able to inform themselves. The selection of the Supreme Court of the United States and all members of the Federal judiciary is also left to the President. The success with which this system has in general operated speaks well for the wisdom of our forefathers who adopted it. It is also a satisfactory answer to anyone who might say that it contravenes the principle of the separation of powers of the executive and judiciary. Surely no one was more jealous of the principle of the separation of powers of these departments of government than the framers of the Constitution of the United States, yet they provided for the appointment of the Federal judges by the chief executive with the advice and consent of the Senate.

The appointive system prevails in one form or another and in respect to certain courts in seven states of the Union, namely, Connecticut, Delaware, New Jersey, Maine, Massachusetts, Missouri and New Hampshire. It prevails in a certain form in California. In England judges are appointed.

If machinery can be devised to surround the appointive system with further safeguards to insure the appointment of only qualified persons, so much the better. Thus the executive might be required to appoint from a selected list supplied by some authorized body composed of a group in whom the public would have confidence as to their singleness of purpose of recommending only candidates with real qualifications. Various plans of this nature have been devised. The American Bar Association has approved of such a plan. The Association of the Bar of the City of New York adopted a resolution some time ago recommending a similar plan and the Citizens Committee on the Courts,

Inc. has proposed a plan. I am not here today to urge any particular plan. My purpose is merely to emphasize the fallacy of the assumption underlying the present practice that our judges are really being chosen by the people. It is perhaps too much to expect that political affiliations will play no part in a judge's selection, whatever method be adopted. But let us hope that it is not too much to expect that political considerations shall not be the only criteria and that some system may be found whereby qualifications for the job may also play an important part.

And so, ladies and gentlemen, and particularly those of you who are not residents of our metropolitan area, I hope that you will examine sympathetically any suggestions that may emanate from us in this area that there should be devised, at least for our use here, some change in the present procedures. Do not judge our situation as being necessarily comparable to that which may exist in your particular community where candidates for judgeships may be the outstanding leaders in their profession, eminent in your community, well known to the electorate. I pray you to be tolerant of any plan which might ultimately be presented which would at least give us the option of bringing about a situation under which our voters here would not have to be confronted on election day with any such monstrosity as a ballot of the length and complexity as you see here as Exhibit A.

A Continued Defense of the Constitution Against the Bricker Proposals

REPORT BY

THE COMMITTEE ON FEDERAL LEGISLATION

AND

THE COMMITTEE ON INTERNATIONAL LAW

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I. INTRODUCTION

On January 6, 1955, Senator Bricker once again introduced "The Bricker Amendment," this time as S. J. Res. 1 of the 84th Congress ["S. J. Res. 1 (1955)"], with the same fundamental objectives set forth in S. J. Res. 1 of the 83rd Congress ["S. J. Res. 1 (1953)"], and its predecessors, S. J. Res. 130 and S. J. Res. 43 of the 82nd Congress.[1]

This current proposal reflects the chief points of the following basic propositions which have been the subject of most of the proposals to limit or define by Constitutional amendment the scope and operation of the treaty power and the power to make executive agreements:[2]

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[1] We have made three previous reports opposing Senator Bricker's proposals. Our first report set forth the reasons for opposition to the proposals made in this field (as well as to the particular language of S.J. Res. 130, 82nd Cong.) and was approved at the annual meeting of the Association on May 13, 1952. Our second report, concerned primarily with S.J. Res. 1 as originally introduced on January 7, 1953 by Senator Bricker, was printed in THE RECORD of The Association for April, 1953. Our third report dealt with the amended version of S.J. Res. 1 as reported out June 15, 1953 by a majority of the Senate Judiciary Committee and also discussed the substitute introduced for declaratory purposes by Senator Knowland on July 22, 1953: it was printed in THE RECORD of the Association for December, 1953.

Reprints of our present report may be obtained from Paul B. DeWitt, Executive Secretary, The Association of the Bar of the City of New York, 42 West 44th Street, New York 36.

[2] See Appendix A for parallel charts of major proposals in this area made last year, including compromise proposals introduced and voted upon after reporting of S.J. Res. 1 (1953) by the Committee on the Judiciary to the Senate; and see Appendix B for the full text of S.J. Res. 1 (1955).

1. Treaties and executive agreements shall not be effective or enforceable as the law of the land unless implemented by legislation—Federal, if authorized by Constitutional power other than the treaty power, or State, if such other Constitutional power is lacking.

2. Congress has or shall be explicitly given plenary Constitutional power to regulate executive agreements.[3]

3. The Constitution shall expressly provide that treaties and executive agreements shall not conflict with the Constitution.

These proposals have not appeared in the form or order set forth, but represent the basic program of the proponents of change in the treaty power.

The first two propositions are affirmatively dangerous and would effect a radical realignment of Constitutional structure. The third is, at best, unnecessarily expressive of a truism, and, at worst, an ambiguous embodiment of concepts expressed in the other propositions.

S. J. Res. 1 (1953), as reported to the last Senate by the Judiciary Committee, was never voted upon as a Constitutional amendment. Rather, after consideration and tentative adoption by majority vote of various alternatives and compromises, vote was taken upon the so-called George Amendment,[4] resulting in a vote of 60 to 31, or one vote short of the necessary two-thirds of the Senators present. The George Amendment reflected in full in its Section 1 the third of the propositions stated above, and reflected in its Section 2 the first of the stated propositions only to the extent that it would have prevented an executive agreement from becoming effective as internal law unless implemented by Federal legislation. The Bricker Amendment, in a form containing substantially all the philosophy of fundamental Constitutional change, did not have the support of a majority of the Senate.

II. EXISTING CONSTITUTIONAL AND POLITICAL LIMITATIONS ON TREATIES AND EXECUTIVE AGREEMENTS

The proponents of the philosophy of S. J. Res. 1 (1955), and its predecessors, proceed upon the theory that the provisions of the

[3] S.J. Res. 1 (1955) does not include a grant of power to Congress to "regulate" executive agreements although S.J. Res. 1 (1953) did so provide. See discussion Point III (2) *Infra.*

[4] See Appendix A and discussion Point IV (2) *infra.*

Constitution pertaining to treaties and the conduct of foreign affairs rest upon an antiquated and naive structure which inherently invites abuse in the face of the international pressures and tensions of the present day. The solution offered by the proponents is to redistribute and diffuse the power and authority to deal with foreign affairs.

Actually, the existing Constitutional structure is remarkably sophisticated and durable, and a review of its basic features should go far towards demonstrating the dangers and folly of tinkering with its fundamentals.

The Federal power, as set forth in the Constitution, is, of course, the sum of the powers delegated by the people of the original states to the new central government, such powers as were not delegated being left in the states or in the people themselves. The bulk of these delegated powers are fairly specific in character and indicate, at least broadly, their respective areas of operation. These include laying of taxes, coining of money, regulation of interstate and foreign commerce, establishing of rules for patents, copyrights and bankruptcies, and the establishment of post offices. With respect to treaties, however, the Constitution provides that the President

> "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur;"[6]

The Constitution further provides:

> "No State shall enter into any Treaty, Alliance or Confederation;"[8]

Without the Consent of Congress, the States are prohibited from entering into

> "any Agreement or Compact . . . with a foreign Power,"[7]

Thus, the scope of the treaty power of the Federal government under the Constitution is plenary in the sense that it is not confined to enumerated areas but extends to all fields which may properly be the subject of negotiation with a foreign country. The power to

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[6] Art. II, §2, cl. 2.
[8] Art. I, §10, cl. 1.
[7] Art. I, §10, cl. 3.

negotiate and make treaties is, under the Constitution, a Presidential or executive power, subject to the two-thirds approval of the Senate. A proposal of Gouverneur Morris in the Constitutional Convention, that no treaty shall be binding on the States which is not ratified by a law, was rejected.[8]

Accordingly, treaties can and do embrace subject matters not generally considered within the scope of powers specifically delegated to Congress, such as mutual rights of inheritance, reciprocal privileges of doing business or engaging in professions, wildlife protection, rights of consular officers in settlement of decedents' estates, and recognition of debts.

There is nothing haphazard or fortuitous in the Constitutional background or framework of the treaty power, nor were the basic provisions drawn in a carefree or placid atmosphere. For their day, the leaders of the new country had to cope with their full share of world tensions and international intrigue. Experience under the Articles of Confederation had demonstrated that a treaty power of plenary scope and binding on the States was one of the most vital objectives in planning the new government, and that a surrender by the states of their independent power with respect to foreign affairs was essential.[9]

The creation of a treaty power of plenary scope and the vesting of primary responsibility for negotiation and execution in the executive branch does not mean that the treaty power is not subject to efficient and adequate restraints. Many exist, and all have meaning within our framework of checks and balances.

1. *Limitations on Treaties*

(i) *The requirement of two-thirds Senatorial consent.* The efficacy of this restraint should be self-evident on its face. Apart from the well known example of the Treaty of Versailles, about 11% of treaties submitted since 1789 have failed to secure Senate approval and an additional 18% were approved subject to reservations.[10]

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[8] 2 *Farrand, The Records of the Federal Convention,* 1911 Edition, p. 392.

[9] 1 *Farrand, The Records of the Federal Convention,* pp. 47, 54, 61.

[10] *Hearings before a Subcommittee of the Committee on the Judiciary on S.J. Res. 1 and S.J. Res. 43,* 83rd Cong., 1st Sess. (1953), hereinafter referred to as "Hearings," p. 836.

(ii) *The Constitution itself.* The proponents of basic Constitutional amendment in the treaty area refuse to credit the statements of qualified persons that the treaty power is limited by the Constitution itself.[11] The instances in which the Supreme Court has had occasion to reiterate the existence of such limitation should suffice to convince the most sceptical.[12] Such declarations have been belittled as dicta,[13] but it is significant that in upholding the effect of the treaty power in the various cases, the Court has given notice and warning that the treaty power is limited by the Constitution.

A noteworthy example is *Prevost* v. *Greneaux*,[14] where the Court held that a tax which had accrued to a state was not intended to be divested by a treaty. The Court stated: "And certainly a treaty, subsequently made by the United States with France, could not divest rights of property already vested in the State, even if the words of the treaty had imported such intention." And, in *Doe* v. *Braden*,[15] the court said:

> "The treaty is therefore a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions, *unless they violate the Constitution of the United States.*" (Emphasis supplied).

The proponents point to *Missouri* v. *Holland*,[16] as demonstrating a bootstrap or back door recourse to Constitutional evasion whereby

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[11] See Hearings, p. 907; see the replies of the deans and professors of constitutional law of American law schools to Senator Wiley's request for their views on S.J. Res. 1 (1953), contained in *Proposals to Amend the Treaty-Making Provisions of the Constitution: Views of Deans and Professors of Law*, print of Senate Committee on the Judiciary (November 1953); *Dean, Amending the Treaty Power*, 6 Stan. L. Rev., p. 589 (1954).

[12] United States v. Minnesota, 270 U.S. 181, 207 (1926); Geofroy v. Riggs, 133 U.S. 258, 267 (1889); The Cherokee Tobacco, 11 Wall 616, 620 (1870); Brown v. Duchesne, 19 How. 183, 197 (1856); Doe v. Braden, 16 How. 635, 657 (1853).

It may be noted that in the Dred Scott decision [Scott v. Sanford, 19 How. 393, 446–54 (1857)] a statute [The Missouri Compromise, 3 Stat. 548 (1820)] implementing a treaty [The Louisiana Purchase, 8 Stat. 200 (1803)] was held repugnant to the Fifth Amendment. See Cowles, Treaties and Constitutional Law: Property Interferences and Due Process of Law, 159–76 (1941).

[13] Majority report of the Senate Committee on the Judiciary on S.J. Res. 1 (1953), Sen. Rep. No. 412, 83d Cong., 1st Sess., hereinafter referred to as the "Majority Report," p. 3.

[14] 19 How. 1, 7 (1856).

[15] 16 How. 635, 657 (1853).

[16] 252 U.S. 416.

the Tenth Amendment was sidestepped.[17] This case has been given extended discussion so frequently that detailed repetition is not necessary.[18] Without question, however, the Tenth Amendment by its terms is not an independent Constitutional force in the face of an expressly delegated Federal power but merely reserves to the States or to the people powers not expressly delegated to the Federal Government.[19] The treaty power is an expressly delegated power, and hence has not been and cannot be in conflict with the Tenth Amendment.

(iii) *A subsequent statute.* A subsequent act of Congress will prevail over a treaty in its operation as internal law.[20]

(iv) *Practical Restraints.* As additional checks on Presidential power, Congress has the power of the purse, of investigation, and of confirmation of Presidential appointments.[21]

2. *Limitations on Executive Agreements*

International agreements other than treaties are commonly known as executive agreements. The Constitution does not in terms provide for the making of executive agreements. The Constitution in fact says very little as to the way the President shall implement his basic executive powers. An executive agreement is but one of many ways in which the President meets his responsibilities in foreign affairs and as Commander-in-Chief of the armed forces. Nevertheless, a recognized constitutional framework, containing adequate restraints, presently exists within which executive agreements operate.

(i) *Congressional Participation.* Executive agreements not clearly pertaining to the President's discharge of his exclusive constitutional powers are generally entered into pursuant to legislative authority

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[17] Majority Report, p. 4.

[18] A Federal statute protecting migratory birds originally held invalid as not being within the delegated powers of Congress was upheld when passed in implementation of a treaty.

[19] This applies to any power. *E.g. United States* v. *Darby,* 312 U.S. 100, 123–124 (1941), involving the commerce power.

[20] Chae Chan Ping v. United States, 130 U.S. 581 (1889); Whitney v. Robertson, 124 U.S. 190 (1888); Head Money Cases, 112 U.S. 580 (1884); The Cherokee Tobacco, 11 Wall 616 (1870). The international obligation, of course, continues, and the other contracting nation may press a claim for damages through diplomatic or international judicial channels.

[21] See United States v. Lovett, 328 U.S. 303 (1946).

or require legislation for implementation in their operation. Executive agreements made or operating in the absence of Congressional participation generally involve exclusive Presidential authority such as command of the armed forces or diplomatic powers, including the power to appoint and receive ambassadors and other public ministers.[23]

(ii) *The Constitution itself.* Constitutional limitations applicable to treaties clearly apply to executive agreements.[24] Additionally, since, unlike the treaty power, there is no express "executive agreement power" in the Constitution, an executive agreement must necessarily rest on some independently delegated power, executive or Congressional.

(iii) *Prior or Subsequent Statute.* An act of Congress, provided it does not represent an invasion of exclusive executive powers, will override a conflicting executive agreement. This is so whether the statute is passed before or after the date of the agreement.[25]

(iv) *Practical Restraints.* The Congressional powers of the purse, investigation and confirmation, are equally applicable as checks on executive agreements.

III. PROPOSALS TO LIMIT OR DEFINE THE SUBJECT MATTER OF INTERNATIONAL AGREEMENTS

Limiting or defining the subject matter with which treaties or other international agreements can deal has been one of the principal objectives of the proponents of the Bricker Amendment. Initially this objective was reflected in proposals to remove certain areas from the scope of the treaty-making power. Thus, S.J. Res. 130 (82nd Cong.) provided that "no treaty or executive agreement shall be made respecting the rights of citizens of the United States protected by this

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[23] Hearings, pp. 853–861.

[24] Seery v. United States, U.S. Ct. of Claims, January 11, 1955, 23 U.S. Law Week 2338 (Jan. 18, 1955): ". . . we think that there can be no doubt that an executive agreement, not being a transaction which is even mentioned in the Constitution, cannot impair constitutional rights." In *United States v. Pink*, 315 U.S. 203 (1942), the Court carefully considered whether favoring United States citizens by giving effect to the Litvinov Assignment to the disadvantage of foreign creditors violated the Fifth Amendment and decided that it did not.

[25] *United States v. Capps, Inc.*, 204 F. (2) 655 (4th Cir., 1953); affirmed on other grounds February 7, 1955, 23 U.S. Law Week 4085.

Constitution," and that "no treaty or executive agreement shall vest in any international organization or in any foreign power any of the legislative, executive or judicial powers" vested in the respective branches of the Federal Government. More recently, the attack on the scope of the agreement-making power has been more indirect through proposals, such as the "which" clause, the effect of which would be to require participation by the State Legislatures if agreements touching certain subjects were made, or such as the proposal to give Congress or the Senate full power to determine in what areas executive agreements may properly be made.

(1) *A "which" clause (with or without the "which") would divide the power to execute our foreign policy between the Federal and State Governments.*

The most sustained effort thus far of the proponents of the Bricker Amendment to restrict the scope of the treaty-making power has been reflected in the destructive "which" clause. The version of the "which" clause included in S.J. Res. 1 (1953), as reported, read as follows:

> "A treaty shall become effective as internal law in the United States only through legislation *which would be valid in the absence of treaty.*" (Emphasis supplied)

Opposition in the 1954 Senate debate to the "which" clause was so substantial that it was stricken from the amendment under consideration by a 44–43 vote on February 17, 1954. Nevertheless, S.J. Res. 1 (1955) contains a revised version of the "which" clause differing from previous versions only in the elimination of the "which" and the direct reference to executive agreements which in earlier versions were covered only by reference back to this section.

> "A treaty or other international agreement shall become effective as internal law in the United States only through legislation *valid in the absence of international agreement.*" (Emphasis supplied)

These words are deceptive and dangerous. They would knock treaties out of our Supremacy Clause, and thus set the clock back to our impotence under the Articles of Confederation.

The first clause of these proposals—the so-called non-self-executing clause (discussed in Point IV hereof)—would deprive a treaty or

executive agreement of all force as law within the United States in the absence of legislation. In what cases Congress or the State Legislatures would be required to pass the necessary legislation is not stated in so many words, but is to be determined by the "which" clause (in italics above). The "which" clause would restrict the power of Congress itself to make a treaty effective as law in the United States to the areas in which Congress could legislate in the absence of a treaty. As to matters falling outside these areas, treaties would be effective only to the extent the State Legislatures passed the necessary implementing legislation.

This combination of the non-self-executing clause and the "which" clause would not only reduce the power of Congress to implement a treaty, but would also contract the Federal Government's present power to make a treaty dealing with any matter "properly the subject of negotiation with a foreign country."[35] For the "which" clause would, in effect, restrict the scope of our treaties to those specific subjects on which Congress has power to make laws generally. In other words, we could not make a treaty that would be binding on the States in the fields otherwise reserved to them. We could, of course, go through the motions of entering into a treaty which dealt with these fields, but the likelihood of negotiating such a treaty, and its value to us if negotiated, would be much reduced by the fact that we could not assure the other nation that the legislatures of the 48 States would carry out its provisions.

Under the Articles of Confederation, which also gave the national government the legal power to enter into treaties, but gave it no power to make state governments enforce them, "Abortive negotiations with other powers, notably Austria and Denmark, failed because the growing ineptitude and powerlessness of the Confederation to enforce its treaties against the thirteen component states convinced foreign nations that the Continental Congress had ceased to be a responsible body and that the United States itself might cease to be a nation. . . ."[36]

Among the treaties which the Federal Government could not have enforced under the "which" clause were the treaty ending the Revolutionary War,[37] a treaty giving an alien the right to engage in a local

[35] *Geofroy v. Riggs*, 133 U.S. 258 (1890).
[36] Bemis, *A Diplomatic History of the United States*, 366 (1936).
[37] Cf. *Ware v. Hylton*, 3 Dall 199 (1796).

business,[28] or even a treaty protecting migratory birds.[29] With the "which" clause engrafted on the Constitution the United States Government would no longer be able to obtain protection for our citizens abroad on such matters as the right to own and inherit property, the right to do business, and the right to collect debts, by offering reciprocal protection for aliens here. Such matters have been a traditional subject of treaties since the early days of the Republic.[30]

Each of these examples, in some or all of its aspects, does not fall within any power which the Constitution delegates to our Federal Government—aside from the treaty power. If the treaty power were shrunk by the "which" clause, there would be no way for us to make effective treaties dealing with these or other matters which are now, except under the treaty power, reserved to the states. And with the uncertainties that lie ahead for all nations, who can be sure today that we shall never want to make treaties in new fields? We shall need a broader base for peace and friendship than military alliances against war. "We must provide machinery and techniques to encourage that peaceful communication and mutual confidence which alone can finally lift the burden of arms from the backs of men."[31]

Much of the argument adduced in support of the "which" clause is based upon opposition to multilateral treaties or covenants which have been proposed or drafted under the auspices of the United Nations, especially in the field of human rights. We do not undertake to express an opinion on such treaties, and indeed, even if it were possible to predict now what their terms may be if and when they are submitted to the Senate for consideration, we would regard their advantages or disadvantages as not relevant to a discussion of the Bricker Amendment. There is no point in crippling our treaty machinery[32] because a few unwise treaties have been drafted any more

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[28] Cf. *Asakura v. City of Seattle*, 265 U.S. 332 (1924).

[29] Cf. *Missouri v. Holland*, 252 U.S. 416 (1920).

[30] *E.g.*, three treaties of alliance with France (1778), 1 Malloy, *United States Treaties and Conventions*, 468, 479, 482.

[31] President Eisenhower's address before the United Church Women at Atlantic City, The New York Times, October 7, 1953, p. 3.

[32] Under existing Constitutional procedures, in cases where the interests of the respective states are considered paramount, the Senate may insist on the inclusion in the treaty itself of a provision, or consent to ratification with the reservation, that the treaty shall be operative in each state only in accordance with state law. See 1953 treaties of friendship, commerce and navigation with Israel, Denmark, Greece,

than we should revamp our legislative procedure because a few unwise bills have been introduced. The best results, it seems to us, will be obtained by considering any particular treaty on its own merits and at the proper time. We should not evade frank consideration of controversial subjects by relegating them in advance to the limbo of unconstitutionality.

In our dealings with other countries we must speak with one voice. In furtherance of giving the treaty power to the Federal Government alone, the Constitution forbade it to the states. The "which" clause would create a vacuum in the Constitution, a vacuum where neither the states nor the nation could make effective treaties.

This Committee fully subscribes to the statement of Senator Alexander Wiley in commenting on the demise of the "which" clause in the 83d Congress:

> "It died because it would have resulted in the incredible blunder of returning our Nation—greatest Nation on earth—to a condition of primitive helplessness which had prevailed before 1787—before the weak, ineffective Articles of Confederation were replaced by the Constitution of the United States."[88]

2. *Complete authority in Congress to "regulate" executive agreements would radically alter the present Constitutional balance of power, and establish the principle of plenary Congressional power not only over international agreements, but also, potentially, over the entire conduct of foreign relations.*

Another objective in the program to restrict the agreement-making power has been the proposal to have Congress exercise full power over executive agreements. Thus, Section 3 of S. J. Res. 1 (1953) as reported provided that "Congress shall have power to regulate all executive and other agreements with any foreign power or international organization."

No such provision is included in S.J. Res. 1 (1955). The reason for the omission, according to Senator Bricker, is that it is already widely conceded that Congress now has full power to regulate executive

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Japan and West Germany, leaving it to the action of each state as to whether aliens should be permitted to practice law. Dept. of State Bull., Sept. 7, 1953, p. 308.

[88] Cong. Rec., February 5, 1954, p. A959.

agreements.[54] This asserted plenary power in Congress is said to rest on the "necessary and proper" clause of the Constitution in which Congress is given the power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [the Powers expressly delegated to Congress], and all other Powers vested by this Constitution in the Government of the United States or in any Department or Office thereof."[55]

It is the view of the Committee that Congress does not now enjoy plenary power with respect to regulation of all executive agreements. The "necessary and proper" clause will support Congressional legislation necessary to implement executive agreements, but it can hardly serve as an independent source of power to regulate or, as has been urged, even to prohibit the exercise of power to enter into executive agreements under the authority of other provisions of the Constitution.

While rejecting the doctrine of plenary authority in Congress to regulate any and all executive agreements, the Committee agrees that Congress does have, and has for many years exercised, the power to regulate executive agreements dealing with matters within the scope of the powers delegated to Congress.

In President Washington's first administration, Congress authorized the Postmaster General to make suitable arrangements with foreign postmasters for the reciprocal handling of mail.[56] Of the total of some 1,527 international agreements other than treaties published in State Department publications from 1928 to January 20, 1953, some 1,139 were agreements entered into and given effect pursuant to or within the limitations of acts of Congress and treaties. Among the best known examples of such Congressionally authorized executive agreements are the Reciprocal Trade Agreements made under and in conformity with the Trade Agreements Act, and the Lend Lease and Lend Lease Settlement Agreements made under and in conformity with pertinent legislation.[57]

It is the conclusion of the Committee that under the present terms of the Constitution and constitutional practice the making of executive agreements is largely a joint power exercised by the President and

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[54] Cong. Rec., January 6, 1955, p. 82.
[55] Article I, §8, cl. 18.
[56] 1 Stat. 239 (1792).
[57] See Department of State Memorandum, Hearings, p. 855.

Congress in cooperation and accordingly has for its constitutional basis the combination of their respective powers under the Constitution. Since in all but a relatively small number of cases involving executive agreements of any significance or long duration the President and Congress have acted in concert, it is difficult to define what their separate powers might be in the event of a test of power between them.

As Justice Jackson pointed out in his concurring opinion in the *Steel Seizure* cases:[88]

> "The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. . . .
>
> "1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. . . .
>
> "2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and

[88] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 667 (1952).

contemporary imponderables rather than on abstract theories of law.

"3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system."[39]

Justice Jackson's analysis, though directed in the *Steel Seizure* cases to the problem of the limits of the President's power in internal affairs, is equally applicable with respect to the question of the scope of Presidential and Congressional powers in foreign affairs, and suggests the difficulty, and in the Committee's view the undesirability, of exact definition of their respective spheres of primary authority.

It would appear that the President does have independent power to conclude executive agreements pursuant to his diplomatic powers, including the power to appoint and receive ambassadors and other public ministers.[40] He also has independent power to make military agreements pursuant to his express powers as Commander-in-Chief.[41] On the other hand, Congress would appear to have primary power under the Constitution with respect to executive agreements dealing with matters within the scope of its delegated powers, particularly its powers to "provide for the common Defence" and "To regulate Commerce with foreign Nations"[42] even where the President has concurrent power under his delegated power, for example, as Commander-in-Chief. Moreover, it would appear that Congress has primary Constitutional power with respect to executive agreements which are legislative in character. The majority opinion in the *Steel Seizure* cases[43] established beyond question that within our consti-

[39] 343 U.S. 635, 638.
[40] Article II, §2, cl. 2 and §3.
[41] Article II, §2, cl. 1.
[42] Article I, §8, cls. 1 and 3.
[43] 343 U.S. 579 (1952) holding that an Executive Order directing the seizure and operation of the steel mills was legislative in character and hence invalid since

tutional framework, Congress and not the President is the "lawmaker."

The attempt to delineate the respective areas in which the President or Congress enjoys a pre-eminent position with respect to executive agreements must be in very general terms without rigid demarcations. As Justice Holmes has pointed out, "The great ordinances of the Constitution do not establish and divide fields of black and white."[44] The primary interest of this Committee has not been to delineate precisely the respective areas of pre-eminence but rather to indicate that the Constitutional structure is one of shared power. Thus, any proposal to vest in Congress plenary power to regulate, and hence to prohibit, the making of executive agreements, would in fact result in a radical shift in the present Constitutional balance of power through the assertion of full legislative power not only over all executive agreements but also potentially over the entire conduct of foreign relations.

As Commander-in-Chief and sole spokesman of the United States in negotiating and communicating with foreign governments, the President must enter into executive agreements with other nations to meet emergencies as they arise as well as to handle the routine affairs of Government. Where allies are involved, as they usually are, it is impossible to wage war effectively without a continuous process of understandings and agreements. The framers of the Constitution knew from their own experience in the Revolutionary War that Congress cannot direct campaigns. Nor can Congress carry on our day-to-day relations with foreign governments.

Any branch of the Government to be effective must have power and power by its very nature is subject to abuse. This Committee believes that there would be more rather than less risk of abuse in plenary Congressional control of foreign affairs than there is in the present system with the President and Congress sharing the power. Whatever independent power the President has to make executive agreements is subject to the limitations described in Point II above. We refer particularly to the power of Congress to overcome the effectiveness of an executive agreement as internal law by subsequent legislation and, at least in an area within Congress' expressly dele-

"The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.* at 589.

[44] Dissenting opinion in *Springer v. Philippine Islands,* 277 U.S. 189, 209 (1928).

gated powers, by prior legislation,[45] and the necessity for Congressional implementation of most executive agreements including all those requiring the appropriation of moneys.

3. *Constitutional definition of the respective spheres of treaties and executive agreements would be unwise and futile.*

While this Committee does not agree that the solution to the problem of possible Presidential abuse of the power to make executive agreements is to shift the ultimate power over executive agreements from the President to Congress, we do not believe that treaties and executive agreements are interchangeable instruments.[46]

We feel, however, that it is impossible to define the circumstances in which a particular international understanding should be cast in the form of a treaty, an executive agreement entered into pursuant to Congressional authorization, or a Presidential executive agreement. Moreover, the Committee does not agree with the suggestion that the Senate be given the express power to determine whether a particular international agreement should be submitted to the Senate for approval as a treaty.[47] Such a proposal would carry with it many of the same risks as the proposal to give Congress full power to regulate executive agreements, and might be as disruptive of the present balance of Constitutional power.

The Committee agrees with Secretary of State Dulles that "This is an area to be dealt with by friendly cooperation between the three departments of Government which are involved rather than by attempts at constitutional definition, which are futile, or by the absorption by one branch of government of the responsibilities which are presently and properly shared."[48]

Secretary of State Dulles was authorized by President Eisenhower to state:

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[45] See *United States v. Guy W. Capps, Inc., supra.*

[46] See McDougal and Lans: *Treaties and Congressional-Executive or Presidential Agreements; Interchangeable Instruments of National Policy.* 54 Yale L. J. 181, 351, 534–615 (1945).

[47] See Separate Statement of Kenneth F. Burgess contained in Report of Committee on Collaboration Between the Legislative and Executive Branches of the Government of the Section of International and Comparative Law of the A.B.A. set forth at p. 84 of 1954 *Proceedings* of the Section.

[48] 1953 Hearings, p. 828. Professor Borchard has undertaken to distinguish treaties and executive agreements but his distinctions are confined to differences in effect rather than subject matter. 54 Yale L.J. 616, 628 (1945).

". . . It must be recognized that it would be extremely difficult, if not impossible, to fit all agreements into set categories. At times there may be disagreement as to the manner in which agreements are to be dealt with. While recognizing this, the Executive cannot surrender the freedom of action which is necessary for its operations in the foreign-affairs field. In the interest of orderly procedure, however, I feel that the Congress is entitled to know the considerations that enter into the determinations as to which procedures are sought to be followed. To that end, when there is any serious question of this nature and the circumstances permit, the executive branch will consult with appropriate congressional leaders and committees in determining the most suitable way of handling international agreements as they arise."

The Committee regards this statement as not merely a declaration of policy but a logical corollary of the Constitutional principle of separation of powers. As Justice Jackson has pointed out, the Constitution diffuses power the better to secure liberty but it also contemplates that practice will integrate the dispersed powers into workable Government.

IV. PROPOSALS TO DESTROY SELF-EXECUTING EFFECT OF INTERNATIONAL AGREEMENTS

Section 2 of S. J. Res. 1 (1955) contains, as did Section 2 of S. J. Res. 1 (1953), the requirement of implementing legislation before treaties or executive agreements can be effective as "internal law."

1. *The self-executing treaty avoids unnecessary duplication of effort, delay and uncertainty in carrying out our international obligations.*

No one would question the proposition that treaties should require legislative sanction in some form. The form adopted at the Constitutional Convention was two-thirds of the Senators present, thus giving protection to sectional interests[49] and the minority point of view

[49] The Jay-Gardoqui negotiations under the Articles of Confederation looked towards a treaty granting substantial commercial rights, advantageous to the Northern States but closing the Mississippi for a period of years. The Southern States were

and insuring mature consideration of the merits of any treaty proposed.[80] The difficulty of obtaining this two-thirds vote has been one of the principal reasons for the proposal (frequently made even prior to the Bricker Amendment) under which the ratification of treaties would be approved by majority vote of the House and Senate.[81]

A multiple ratification procedure such as is required by S. J. Res. 1 (1955) whereby the Senate passes twice on the treaty, once as a treaty by two-thirds and again as a law by a majority, together with House legislation and Presidential signature of the law, is needlessly repetitive, to say nothing of the increase in the Congressional burden of work and the duplication and delays involved. Even though the proposed amendment limits its scope to the internal law aspects of a treaty, the very vagueness of the term "internal law" would require that all treaties under such an amendment be processed through multiple ratification in order to obviate possible invalidity in some unforeseen aspect.

2. *Proposals to eliminate self-executing executive agreements create more problems than they solve.*

S. J. Res. 1 (1955), in Section 2, expressly requires implementing legislation of the "which" variety to render executive agreements effective as "internal law." S. J. Res. 1 (1953) had the same effect, indirectly, through its Section 3. The George Amendment, introduced on January 27, 1954 as a substitute for the Bricker Amendment, provided on this point that an executive agreement should become effective as internal law only through an act of Congress.

Such proposals reflect a fear that the executive branch can make agreements operating internally on the individual rights of citizens without any legislative body having acted.

Evaluation of these proposals should be undertaken with an understanding of the extent to which Congress does in fact participate in the authorizing and implementing of executive agreements and

understandably opposed. The treaty was not negotiated on such basis. 1953 Hearings, p. 843.

[80] Alexander Hamilton, after expounding the treaty power as one of plenary scope stated: "and it was emphatically for this reason, that it was so carefully guarded; the cooperation of two-thirds of the Senate, with the President, being required to make any treaty whatever." 7 Works of Alexander Hamilton (John C. Hamilton Edition, 1850–51), 518.

[81] H. R. 139, 79th Cong. 1st Sess.; see Borchard, Executive Agreements—A Reply, 54 Yale L.J. 616, 642 (1945).

with an understanding of the Constitutional principle, set forth by Justice Jackson and quoted above, that Presidential power is flexible, expanding and contracting to the extent it harmonizes with or runs counter to the will of Congress.

The State Department memorandum on executive agreements presented at the hearings on S. J. Res. 1 (1953)[53] demonstrated that the bulk of executive agreements do involve Congressional participation. Those that do not are in the area of independent executive responsibility. Requiring Congressional implementation for the internal effectiveness of all agreements presents a possible conflict with the undefined, but nevertheless existing, area of exclusive executive responsibility.

The President's power to affect internal law is not as far-reaching as the proposals would suggest.[54] The case of *United States* v. *Pink*[55] has been cited[56] as evidencing the necessity for further Constitutional restraint on executive agreements, chiefly in light of the following language:

> "A treaty is a 'Law of the Land' under the supremacy clause. (Art. VI, Cl. 2) of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity."

In fact, however, the agreement in question was incidental to the exercise of a clear Presidential power, that of according recognition to a foreign nation—and additionally did not restrict the rights of citizens but rather afforded American claimants against the Soviet Union a priority over foreign creditors of a nationalized Russian insurance company. Finally, the agreement involved Congressional cooperation through the appointment by joint resolution of Congress of a Commissioner to determine claims against the Soviet

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[53] Hearings, p. 853.

[54] Dean, *Amending the Treaty Power*, 6 Stan. L. Rev. 589, 603 (1954).

[55] 315 U.S. 203 (1942). Under the agreement there involved (commonly known as the "Litvinov Assignment") certain Soviet claims founded on Soviet extraterritorial confiscation decrees were assigned to the United States. These claims included claims against the New York Superintendent of Insurance who held assets of former Imperial insurance companies doing business in New York. The action involved the rights of the Superintendent as against the rights of the United States under the Assignment. The Supreme Court held in favor of the United States.

[56] Majority Report, p. 27.

Government to be paid from the fund created by the Litvinov Assignment, an indication of Congressional policy of which the Court took note.[86] This case certainly should not give any reality to the fear that the President can employ an executive agreement as a device for executive legislation infringing the individual rights of citizens.

The George Amendment appears to contain an implication that Federal power—Presidential and Congressional combined—is greater than traditional doctrine would recognize. Because of the specific "treaty power" in the Constitution, treaties may embrace subject matter not otherwise within the delegated powers of the Federal Government. There is, however, no explicit "executive agreement power," and by their nature such agreements are part of the process by which the executive, generally with Congressional participation, implements the conduct of foreign affairs. Necessarily such agreements must rest upon some delegated power. The implication of the George Amendment is that an executive agreement may be effective as internal law in all fields, including those reserved to the States, provided it is sanctioned by an act of Congress. Such an interpretation is probably not contemplated by the proponents of the George Amendment but would seem a likely one on the basis of the language used.

A further highly practical problem is presented by the inherently vague concept of "internal law." At the time of negotiation of an executive agreement other than one of very limited nature, it would be difficult to prophesy whether the agreement might under some circumstances have internal aspects affecting the rights and relations of individuals in the United States. Under the present structure, Congressional implementation could, as in the case of the Litvinov Assignment, provide any working mechanism necessary to carry out the purpose of the agreement. If, however, the Constitution required Congressional action for all internal law purposes, prudence would require that virtually all executive agreements be authorized by prior Congressional legislation. Congress would be swamped in a sea of technical and detailed agreements presented for its consideration and the conduct of our foreign affairs might be paralyzed while Congress was not in session. Subsequent legislation on an *ad hoc* basis with

[86] 315 U.S. 203, 228 (1942).

reference to a preexisting set of facts would raise the problem of *ex post facto* or retroactive legislation.

Without question, any Constitutional amendment requiring legislative authority for all executive agreements operating as "internal law" would raise legal complexities of a serious nature. In addition, Congress might thereby well achieve indirectly the plenary control over foreign relations that the proposal to permit Congressional regulation of all executive agreements would give it directly.[87] It would be far better to cure any defects by the legislature route instead of seeking to alter fundamental Constitutional relationships. Such legislation would be valid at least up to the point where exclusive executive authority appeared to be encroached upon. If such encroachment occurred, the matter could be resolved by negotiation and discussion in the pattern suggested by Secretary of State Dulles,[88] or ultimately by the courts.

V. PROPOSAL TO CHANGE THE SENATE'S PROCEDURE IN CONSENTING TO TREATIES—A ROLL CALL VOTE REQUIREMENT MAY BE ACHIEVED BY A CHANGE IN THE SENATE'S RULES

The following provision, which was contained in the final amended version of S. J. Res. 1 (1953) voted down as a Constitutional amendment on February 26, 1954, is also contained in S. J. Res. 1 (1955):

> "On the question of advising and consenting to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate."

This proposal is designed to prevent treaties slipping through the Senate with only a handful of Senators voting because no challenge has been made to the quorum before a vote is taken. Of course, even under existing Senate procedures this would not happen until the treaty in question had been published, considered at hearings if at all important or controversial, favorably reported by the Committee on Foreign Relations, and placed on the Senate calendar. James

[87] See Point III (2), *supra*.
[88] See note 48, *supra*.

Madison at the Virginia Convention of 1788 remarked that he "thought it astonishing that gentlemen should think that a treaty would be got up with surprise, or that foreign nations should be solicitous to get a treaty only ratified by Senators of a few states."[59] Nonetheless, there is a residual risk of abuse so long as there is no provision for an automatic challenge of the quorum. Moreover, as Madison implied, if only a handful of Senators vote on an important treaty, the other contracting nation might misunderstand that apparent lack of interest.

Assurance against abuse and against any misunderstanding by foreign nations can, however, be obtained by statute or a simple change in the Senate rules as proposed by Senator Lehman in the 83rd Congress.[60] This is not a proper subject for a Constitutional Amendment.

VI. PROPOSALS TO ASSURE SUPREMACY OF CONSTITUTION OVER "CONFLICTING" PROVISIONS OF INTERNATIONAL AGREEMENTS

All the proposed amendments to the treaty provisions of the Constitution have included in one form or another language to the effect that a provision of a treaty which conflicts with the Constitution shall not be of any force or effect.[61] The version appearing in S. J. Res. 1 (1955), as Section 1, is:

> "A provision of a treaty or other international agreement which conflicts with this Constitution, or which is not made in pursuance thereof, shall not be the supreme law of the land nor be of any force or effect."

The proponents of an amendment of this kind assert that its essential purpose is to settle for all time the alleged issue as to whether a treaty can violate the Constitution, particularly provisions of the Bill of Rights.[62] The opposition has as firmly stated that treaties cannot violate the Constitution and that such an amendment is declaratory and serves no useful purpose.

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[59] 3 Elliot's Debates 500 (1876).
[60] Sen. Res. 145, 83d Cong., First Sess. (1953).
[61] See Appendix A.
[62] See Majority Report.

This Committee feels that in view of the explicit statements of the Supreme Court,[63] the explicit views of distinguished Constitutional authorities going back at least as far as John C. Calhoun[64] of South Carolina, and the fundamental principle of Constitutional supremacy established in *Marbury* v. *Madison*[65] there can be no reasonable doubt that international agreements are subject to Constitutional limitations.

This proposal expressly to provide that international agreements are subject to Constitutional limitations is not, as so many of the supporters of the Bricker Amendment suggest, a new proposal designed to plug a recently discovered alleged loophole in the Constituition. As far back as 1788 the North Carolina State Convention made a similar proposal when it recommended that the Constitution not be ratified by North Carolina until it had been amended to include a Bill of Rights and also the following:

> "nor shall any treaty be valid which is contradictory to the Constitution of the United States."[66]

Thus, the First Congress had explicitly before it the very proposal that Senator Bricker is now making and did not include such a provision in the amendments submitted to the state legislatures for ratification on September 25, 1789. North Carolina itself subsequently ratified the Constitution that year.

Our analysis of Section 1 in its various forms and the arguments used to support it discloses that at least some proponents of Section 1, in whatever form it appears, are seeking more than merely a clarification of the supremacy of the Constitution over treaties. It is also true that our opposition runs deeper than a dislike of a declaratory Constitutional amendment because it will clutter up the Constitution.

In recommending Section 1 of S. J. Res. 1 (1953) as reported, the Majority Report of the Committee on the Judiciary referred to

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[63] See note 12, *supra*.

[64] Burdick quotes Calhoun as follows: "No treaty can alter the fabric of our government, nor can it do that which the Constitution has expressly forbade to be done; nor can it do that differently which is directed to be done in a given mode, and all other modes prohibited." The Law of the American Constitution, 77 (1922). See note 11, *supra*.

[65] 1 Cranch 137 (1803).

[66] 4 Elliot's Debates, 246 (1876).

Missouri v. *Holland* four separate times[87] and in the debate on the floor of the Senate, Senator Bricker continued to emphasize that *Missouri* v. *Holland* was a case in which it was "held that a treaty does not have to comply with the terms of the Constitution."[88] The effect of overruling *Missouri* v. *Holland* on the ground that it "conflicts" with the Constitution would of course be identical with the enactment of the "which" clause, for it was the basic holding of *Missouri* v. *Holland* that federal legislation implementing a treaty was not limited to the areas in which Congress could legislate under its specifically delegated powers.

The inclusion in Section 1 of the new S. J. Res. 1 (1955) of the provision that treaties and executive agreements must not only not conflict with but must be made "in pursuance" of the Constitution, adds further to the risk of substantive change disguised as clarification.

A similar provision was included in the compromise proposal originally introduced by Senators Ferguson and Knowland last year. Senator Ferguson explained that the purpose was to meet criticism that the Supremacy Clause of the Constitution elevates treaties over ordinary laws. This criticism is based on the different words used in connection with laws, on the one hand, and with treaties, on the other hand. Laws "made in pursuance of" the Constitution and treaties made "under the authority of the United States" are the supreme law of the land.[89] Senator Ferguson attributed the existing language with respect to treaties to historical reasons, namely, the desire of the framers to make it clear that the treaty of peace with Great Britain, which had been made prior to the adoption of the Constitution, was to have the same status as later treaties.

Even if we assume that the distinction was based on historical reasons, the present language of the Constitution is just as adequate now as it was then; Senator Ferguson did not dispute this. Can we be sure that this proposal, if adopted, would not produce a substantive change in the treaty making power?

A requirement that a treaty be made "in pursuance of" the Constitution might be construed as a requirement that it deal only with fields over which Congress has power to legislate in the absence of a treaty,—in other words that it is a substitute for the "which" clause.

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[87] Majority Report, pp. 3–8.
[88] 100 Cong. Rec. 1793 (Feb. 17, 1954).
[89] Constitution Art. VI, cl. 2.

Alternatively, if this provision merely means that treaties must be entered into pursuant to the stipulated Constitutional procedure, i.e., with the advice and consent of two-thirds of the Senators present, it is not merely declaratory of existing Constitutional practice, but repetitive of another explicit provision in the Constitution, and an open invitation to the courts to seek some other meaning in its provisions. As applied to executive agreements the provision that they must be made "in pursuance of" the Constitution raises a still more troublesome question. There is no expressly stipulated Constitutional procedure for entering into executive agreements. Accordingly, the "in pursuance" clause as applied to executive agreements, if it is taken to be a procedural requirement, might well be interpreted by a court as making the treaty procedure stipulated in the Constitution applicable to all international agreements and thus in effect require all international agreements to be submitted to the Senate as treaties.

Section 1 of S. J. Res. 1 (1955) raises a false issue. When a person not familiar with the Constitution hears that an amendment is proposed stating that treaties and executive agreements shall not conflict with the Constitution, he naturally infers that at the present time treaties and executive agreements can and do override the Constitution; he assumes that the amendment is intended to change the Constitution, not to keep it the same. Furthermore, he assumes that the opponents of the Bricker Amendment are in favor of the supremacy of treaties and executive agreements over the Constitution—a completely false assumption.

The function of Section 1, or so it seems to this Committee, has always been to run interference for the more drastic changes included in other sections of the Bricker Amendments.

VII. CONCLUSION

The present Constitutional ordering of our foreign affairs has served this country exceedingly well for 166 years. The proposals embodied in the various versions of the Bricker Amendment would radically alter this Constitutional scheme by increasing the power of Congress at the expense of the President and by increasing the power of the States at the expense of the Federal Government. At a time

when more than ever in our history it is imperative that this country afford intelligent and constructive leadership, these Bricker proposals would shackle the President and the Senate, in whose hands the Founding Fathers so wisely placed the primary responsibility and initiative in the conduct of our foreign relations.

There may have been times in our history when the American people could have afforded the luxury of learning the undesirability of the Bricker Amendment through trial and error. However, its adoption today would place many impediments upon the conduct of our foreign affairs and military operations and adversely affect our chances of survival in the modern world.

Respectfully submitted,

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February 22, 1955

APPENDIX A

Texts of S.J. Res. 1 (1953) as Reported by Judiciary Committee, of Other Proposals Made During Debate by Senators George, Ferguson and Knowland, and of S. J. Res. 1 (1955) Introduced January 6, 1955

(Provisions included in S.J. Res. 1(1953) as revised and voted on as a Constitutional Amendment, February 26, 1954, are *in italics*)

BRICKER (1953) S.J. Res. 1 (83d Cong.) (as reported by Senate Judiciary Committee, June 15, 1953)	GEORGE *(Jan. 27, 1954)*	FERGUSON–KNOWLAND *(Jan. 27, Feb. 2)*	BRICKER (1955) S.J. Res. 1 (84th Cong.) *(introduced January 6, 1955)*
1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect.	1. *A provision of a treaty or other international agreement which conflicts with this Constitution shall not be of any force or effect.*	1. (Same as George.)	1. A provision of a treaty or other international agreement which conflicts with this Constitution, or which is not made in pursuance thereof, shall not be the supreme law of the land nor be of any force or effect.
2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in absence of treaty.		2. Clause 2 of article VI of the Constitution of the United States is hereby amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this clause, no treaty made after the establishment of this Constitution shall be the supreme law of the land unless made in pursuance of this Constitution."	2. A treaty or other international agreement shall become effective as internal law in the United States only through legislation valid in the absence of international agreement.
3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitations imposed on treaties by this article.	2. *An international agreement other than a treaty shall become effective as internal law in the United States only by an act of the Congress.*	3. *On the question of advising and consenting to the ratification of a treaty the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.*	3. (Same as Section 3 of Ferguson–Knowland.)

APPENDIX B

84TH CONGRESS
1ST SESSION

S. J. RES. 1

IN THE SENATE OF THE UNITED STATES

JANUARY 6, 1955

Mr. BRICKER introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States, relating to the legal effect of certain treaties and other international agreements.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

"ARTICLE —

"SECTION 1. A provision of a treaty or other international agreement which conflicts with this Constitution, or which is not made in pursuance thereof, shall not be the supreme law of the land nor be of any force or effect.

"SEC. 2. A treaty or other international agreement shall become effective as internal law in the United States only through legislation valid in the absence of international agreement.

"SEC. 3. On the question of advising and consenting to the ratification of a treaty, the vote shall be determined by yeas and nays, and the names of the persons voting for and against shall be entered on the Journal of the Senate.

"SEC. 4. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission."

Committee Report

COMMITTEE ON THE BILL OF RIGHTS

REPORT ON BOOK BURNING

The Committee on the Bill of Rights has been asked to report and act on the subject of "BOOK BURNING." We understand the term "book burning" to be the symbol for the suppression of reading matter. There are two aspects of the problem: the nature of the matter suppressed, and the nature of the method of suppression. Our inquiry has included interference from any source, for any reason, with the dissemination to the public or public institutions of any type of reading material. Consequently, we have considered interferences by government or organized private action with the use of school books, with the contents of public libraries, and with the right of retailers and distributors to sell reading material of all kinds.

It will immediately be recognized that some interference is the inevitable concomitant of the process of selection indispensable to the composition of any library or the inventory of a book dealer. Not every book published can or should be on every book shelf. And some books should be on none.

Publications found by fair process to violate literate, adult and clearly defined standards of decency or other criminal safeguards can serve no useful purpose for the community, and interference with their dissemination we find non-objectionable. Similarly, that interference occasioned by the librarian who chooses or rejects a book upon an informed appraisal of whether it will further the objective of offering to readers the fullest and best balanced selection which finances and facilities permit, cannot be condemned. Again, interference by selection is required in the preparation of a specialized library: a reference library should be chosen in accordance with standards of accuracy and objectivity; an Information Service Library established abroad must contain works deemed suitable for that purpose; a children's library screens out those readings which would be morally harmful or disturbing to impressionable youngsters not yet ready to cope with the provocations caused by such literature; etc. Finally, interference is perforce the consequence of the free selection by a book dealer of the publications he will offer for sale.

The interferences described are, we think, required by the very nature of the processes of publication and circulation of books. Any interferences beyond these we view with suspicion; as we do those which ostensibly fall within the suggested categories of allowable interference but do not in fact comport with the purposes, procedures, or standards of those categories; to the extent that there is such a variance, the interference is an infringement of the basic rights safeguarded in the First Amendment by the terms "freedom of speech" and "freedom of the press."

There are, however, types of interference, currently exerted, with the availability of reading material which cannot be justified on any basis and are consequently improper *per se*. Illustrative of this type of interference would be an attempt to remove from a public library the writings of a political theorist or economist on the ground of inconsistency with the principles of the Constitution. We are happy to be able to report that our investigation has disclosed but few recent instances of this type of interference.

In the ninety odd reported cases of actual or attempted interference with the distribution of reading material which took place in 1953 alone, there are a number of cases involving the abuse of what might otherwise be a justifiable interference. To illustrate the nature of the problem, we set forth below a few cases taken from the reports of The American Book Publishers Council or of The American Library Association.

No. 1. In Detroit, Michigan, an officer or division of the Police Department effectively prevented the sale of a variety of paper bound books throughout the city. The activity was apparently directed only against paper bound books and carried out by means of informal advisory opinions given to the possible distributors. The list of objectionable publications was not published, but it is understood that among those whose distribution was prevented are various books by Hemingway, James T. Farrell, and John Dos Passos.

No. 2. In St. Cloud, Minnesota, a censorship board was established under the provision of a city ordinance. The board banned the sale at retail and use in public libraries of the books listed as objectionable by the National Organization of Decent Literature. Included in the banning were such books as "Cakes and Ale" by Somerset Maugham, "Native Son" by Richard Wright, and "Mr. Roberts" by Thomas Heggen. The citizens of Eau Claire, Wisconsin, rejected in a public meeting a proposal for the adoption of a censorship ordinance similar to that adopted in St. Cloud, Minnesota.

No. 3. In February of 1953 a group of individuals under the name of "Decent Literature Committee of Our Lady of Christians Roman Catholic Church" commenced a campaign to persuade storekeepers in the Flatbush section of Brooklyn to remove certain publications from their shelves. The purpose was to proscribe the sale of comic books, crime novels and paper bound reprints on the grounds of obscenity.

The ban was enforced by appealing to retailers to withdraw the objectionable publications under the threat of loss of patronage. If the retailer complied with the Committee's request, he was permitted to display a certificate signed by the Committee indicating that undesirable books were not sold in that store. The certificate was entitled "Certificate of Cooperation" and was issued monthly. The storekeeper was to paste the certificate on the door of his store, and the certificate stated that the particular store had "satisfactorily

complied with the Committee's request." Among the books considered objectionable were the following:

"Sanctuary"; "Soldiers' Pay"; "Wild Palms" by William Faulkner
"What Makes Sammy Run?" by Budd Schulberg
"Man With the Golden Arm" by Nelson Algren
"Native Son" by Richard Wright
"Tobacco Road"; "God's Little Acre" by Erskine Caldwell
"The Young Lions" by Irwin Shaw

No. 4. In 1953 the Police Department in Cleveland, Ohio, commenced a drive to compel the withdrawal from sale of certain books it deemed objectionable within the meaning of a local ordinance prohibiting the display of "indecent literature." Book wholesalers ceased distributing books on the police list. Among those withdrawn from Cleveland newsstands were:

Dr. Sigmund Freud's "General Introduction to Psychoanalysis"
"The Golden Ass" by Apulieus
Somerset Maugham's "Cakes and Ale"
Lucy Freeman's "Fight Against Fears"
John Steinbeck's "The Wayward Bus"
Jo Sinclair's "Sing At My Wake"
Mickey Spillane's "I, The Jury"

No. 5. In Youngstown, Ohio, the Chief of Police requested a book wholesaler to remove from circulation a list of titles which he found objectionable. The list ultimately included 443 books, among them works by James T. Farrell, Sherwood Anderson, John Dos Passos, Somerset Maugham, Christopher Isherwood and John Steinbeck. As a result of this action, the New American Library of World Literature, Inc. obtained a court order enjoining the Chief of Police from restraining the distribution of literature. The court condemned the defendant's failure to avail himself of the proper legal proceedings in a court of law to obtain the elimination from distribution of the objectionable literature.

No. 6. In Canton, Ohio, the Mayor appointed an eight-member Advisory Committee on Obscene Publications. The Committee was appointed following the passage of an ordinance making it unlawful to show or distribute to any minor publications made up of criminal news or criminal acts, or pictures or stories of immoral deeds, lust or crime. The Committee decided that publications should be banned which advocated violation of the Ten Commandments, depicted evil as good, advocated violation of natural virtues such as truth and justice and which challenge the sanctity of family and marriage.

No. 7. In Altoona, Pennsylvania, a local committee of the National Organization of Decent Literature instituted a campaign to eliminate "indecent literature" from the shelves of retailers and newsstands. In July it was reported that 54 stores had agreed to cooperate with the Committee and only 2 merchants had refused to go along with the Committee's request to remove objectionable material from sale. Included on the list of objectionable material as published by the National Organization of Decent Literature are:

"Flee the Angry Strangers" by George Mandel
"Theresa" by Emile Zola
"Wait for Tomorrow" by Robert Wilder
"The Farmer's Hotel" by John O'Hara

No. 8. In November of 1953 it was reported that the District Attorney in Milwaukee had issued an order banning the best-seller war novel, "The Naked and the Dead," from Milwaukee County book stores and the County Library. Thereafter, the Milwaukee Literary Commission voted 5 to 1 that the book was "a sincere literary effort and not obscene." The District Attorney thereupon withdrew the ban.

No. 9. The Secretary of State of Illinois ordered the State Librarian to remove all books in State libraries believed to be "salacious, vulgar, or obscene." As a result of this order, over 6,000 books were removed from circulation, among them John Dos Passos' "U.S.A.," John O'Hara's "A Rage to Live," and "Kingsblood Royal" by Sinclair Lewis. As a result of severe newspaper criticism of this action, the ban was withdrawn and the list of banned books was to be reconsidered by the Library Advisory Committee.

From the foregoing, it is apparent that the important problem in this country at this time lies not with the interference that is improper *per se*, and readily recognizable as such, but with the abuse of what would otherwise be a justifiable interference.

The most frequent instance of this latter type is found in the obscenity cases. In cases involving government ordinances proscribing obscene publications, either the term "obscene" is so broadly defined as to permit restraint on other grounds or the ordinance is enforced in such a way as to reach publications which are not actually obscene.

Although this is cause for concern, we believe the gravest danger lies in the case where the interference for alleged obscenity is a product of organized private, as distinguished from government, action. The interference may take any form. For example, intimidation or boycotting of dealers, forcing cancellation of subscriptions by libraries and attacks on mailing privileges.

In this situation, the result is that one group within the community is compelling the balance of the community to conform to its standards of what it thinks should or should not be read. The censorship thus exercised, since it

is that of a private group, is without the benefit of the procedural safeguards established by law as necessary to insure the proper application of the proscriptive standard. The evil is compounded by the fact that there is no sufficient remedy available against this type of restraint. When the State acts, those injured can enjoin violation of the Fourteenth Amendment. But when a private group acts, the Constitution affords no basis for injunctive relief. The right of the injured party, usually the publisher or retailer, to compensatory damages, even if available in all states, is of doubtful value because of the difficulty of proof of damage.

Furthermore, it is doubtful if a private right of action for damages is adequate even if damages could be proved. The wrong is basically public not private. What is involved is the infringement of a keystone of a democratic society: the preserving of a political system which permits the greatest possible freedom in the exchange of ideas. Legislation penalizing organized private action which interferes, as described above, with the distribution of reading material would cure this danger. Legislation such as this would compel private groups which wish to prohibit the distribution, or the maintenance on a library shelf, of a particular book or magazine to invoke action under the applicable local ordinance.

We believe that the number of instances in the recent past of attempts of private groups to enforce their particular views on the entire community of what is proper in reading material is sufficiently great to constitute a very real danger to the continued enjoyment of the fundamental right of freedom of expression. Consequently, we recommend that this Association adopt the following resolution:

> RESOLVED, that The Association of the Bar of the City of New York deplores and condemns the attempts of any individual or group, private or public, to interfere in any manner with the publication, circulation, or reading of any published matter, other than by means of regular applicable statutory procedures and standards; this resolution does not purport to limit the expression of views by any individual or group concerning any published matter.

Respectfully submitted,

COMMITTEE ON THE BILL OF RIGHTS

FIFIELD WORKUM, *Chairman*
WILLIAM T. ANDREWS
WALTER E. BEER, JR.
CLIFFORD P. CASE
JOHN W. CASTLES, III
WILLIAM C. CHANLER
MURRAY A. GORDON
KENNETH W. GREENAWALT
ORRIN G. JUDD
ARTHUR LEVITT
JOHN COIT MELENEY
CHARLES H. MEYER
ROGER B. ORESMAN
NATHANIEL PHILLIPS
BENJAMIN R. SHUTE
DAVID SIMON

January 6, 1955

The Library

SIDNEY B. HILL, *Librarian*

RECENT PUBLICATIONS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

1952–1954

"A profession is a vocation whose practice is founded upon an understanding of the theoretical structure of some department of learning or science, and upon the abilities accompanying such understanding. This understanding and these abilities are applied to the vital practical affairs of man." *

The contributions made by the officers and committees in fulfilling the purposes of the Association—"of cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice"—are submited in this fourth checklist of its publications. Many of them have been issued in a limited supply and regrettably are not available for general distribution.

PRESIDENT

The President's Letter. Bethuel M. Webster, President. November 17, 1952. 1952. 7 Record 478–9; February 15, 1953. 1953. 8 Record 104–5, March 16, 1953, 149–50, November 16, 1953, 452–3; May 11, 1954. 1954. 9 Record 269–71.

Report of the President, Bethuel M. Webster. 1952–53, September 15, 1953. 1953. 8 Record 325–66; 1953–54, September 1, 1954. 1954. 9 Record 316–24.

Amend in haste, repent at leisure, by Bethuel M. Webster. June 26, 1953.

Let's take a good look, by Bethuel M. Webster. (Notes for a speech on current proposals to amend the Constitution at the annual meeting of the American Newspaper Publishers Association, April 22, 1953)

The President's Letter. Allen T. Klots, President. September 15, 1954. 1954. 9 Record 325–7.

TREASURER

The Treasurer's Letter. George A. Spiegelberg, Treasurer. November 14, 1952. 1953. 8 Record 13–14.

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* Morris L. Cogan, *Harvard Educational Review*, Winter 1953.

COMMITTEE ON ADMINISTRATIVE LAW

Summary of preliminary report of Subcommittee on subpoenas to and by administrative agencies. April 7, 1953. Mimeo. Morton Pepper, chairman.

COMMITTEE ON BANKRUPTCY AND CORPORATE REORGANIZATIONS

Letter from Edmund Burke, Jr., to the chairman of the Senate Committee on Interstate and Foreign Commerce expressing views on S. 907 and S. 978. March 20, 1953. Mimeo.

Letter to the chairman of the House Committee on the Judiciary expressing views on H.R. 77, H.R. 79, H.R. 3363, H.R. 447, H.R. 1068, and H.R. 3584. March 25, 1953. Edmund Burke, Jr., chairman.

COMMITTEE ON THE BILL OF RIGHTS

Report on representation of unpopular causes. January 20, 1953. George S. Leisure, chairman.

Report on published comment on pending litigation and proposed amendment to Section 20 of the Canons of Professional Ethics. May 11, 1954. George S. Leisure, chairman.

COMMITTEE ON COPYRIGHT

Statement in behalf of the Committee in support of H.R. 4059. January 18, 1952. Mimeo. Joseph A. McDonald, chairman.

COMMITTEE ON COURTS OF SUPERIOR JURISDICTION

Preliminary report and recommendations on medical testimony project. September 15, 1952. Mimeo. Albert R. Connelly, chairman.

COMMITTEE ON CRIMINAL COURTS LAW AND PROCEDURE

Bulletins no. 1–36, 1953; 1–30, 1954.

COMMITTEE ON FEDERAL LEGISLATION

Reports on:

S. 1331, "A bill to further implement the full faith and credit clause of the Constitution." May 29, 1952. Mimeo. Theodore Pearson, chairman.

"Joint resolution proposing an amendment to the Constitution of the United States relative to the making of treaties and executive agreements" [S.J. Res. 1, 83rd Congress, 1st Session] March 12, 1953. 1953. 8 Record 167–91. Theodore Pearson, chairman, Committee on Federal Legislation . . . Dana Converse Backus, chairman, Committee on International Law.

Bills relating to increase in salaries of federal judges and provision for annuities to widows of judges. April 13, 1953. Theodore Pearson, chairman.

"Our Constitution and the Dangers of the Bricker Proposals" [The Bricker Amendment. S.J. Res. 1, Relating to treaties and executive agreements, and the Knowland substitute] November 17, 1953. 1953. 8 Record 454–78. Theodore Pearson, chairman, Committee on Federal Legislation . . . Dana Converse Backus, chairman, Committee on International Law.

H.R. 569, authorizing the Postmaster General to impound mail without prior notice. July, 1954. Mimeo. Theodore Pearson, chairman.

Statement in opposition to S.J. Res. 1, 83rd Congress, 1st session; Submitted to Subcommittee No. 1 of the Senate Judiciary Committee, by Theodore Pearson, chairman, Committee on Federal Legislation and Dana Converse Backus, chairman, Committee on International Law. February 18, 1953. Same, February 19, 1953.

COMMITTEE ON FOREIGN LAW

Reports on:

The Protection of American Investments Abroad. May 12, 1953. 1953. 8 Record 250–3. Dudley B. Bonsal, chairman, Committee on Foreign Law . . . Dana Converse Backus, chairman, Committee on International Law.

American Judgments Abroad. 1953. 8 Record 302–8. Dudley B. Bonsal, chairman.

Foreign Exchange Control in New York Courts. Prepared by the Subcommittee of the Committee on Foreign Law, Martin Domke, chairman. April 15, 1954. 1954. 9 Record 239–42.

American Judgments Abroad [Scotland, England and Northern Ireland]. 1954. 9 Record 391–9. Willis L. M. Reese, chairman.

Trading With The Enemy Act of 1917. 1954. 9 Record 27–31. Willis L. M. Reese, chairman.

COMMITTEE ON INSURANCE LAW

Report on problems created by financially irresponsible motorists. December 9, 1952. James B. Donovan, chairman.

Financially Irresponsible Motorists. A statement approving proposals by the Committee on Insurance Law, by Arthur A. Ballantine. 1953. 8 Record 30–1. James B. Donovan, chairman.

COMMITTEE ON THE JUDICIARY

Report to be submitted at stated meeting, October 21, 1952. Louis M. Loeb, chairman (Report on Judicial Candidates).

Letter from Edmund Burke, Jr. to the chairman of the House Committee on the Judiciary.

Letter to members of the Association from Bethuel M. Webster, asking cooperation of membership on qualifications of judicial candidates, and listing names of candidates in coming election. September 30, 1953.

Report to be submitted at stated meeting, October 20, 1953. Louis M. Loeb, chairman (Report on Judicial Candidates).

Report to be submitted at stated meeting, October 19, 1954. Chauncey Belknap, chairman (Report on Judicial Candidates).

COMMITTEE ON LABOR AND SOCIAL SECURITY LEGISLATION

Report with recommendations on the subject of delineation of federal and state jurisdiction in interpretation, enactment and enforcement of state laws in the labor relations field. April 9, 1953. Mimeo.

Minority report on proposed legislation dealing with labor disputes affecting the national welfare. April 30, 1953. Mimeo. Jack M. Perlman; same, David I. Ashe.

Report with recommendations on the subject of the need for additional legislation in the field of strikes and lockouts affecting the national welfare. April 30, 1953. Mimeo. David L. Benetar, chairman.

Report with recommendations on the subject of federal fair employment practices legislation . . . May 1, 1953. David L. Benetar, chairman.

Report with recommendations on the subject of proposed amendments to the Taft-Hartley law. May 1953. Mimeo.

Report on H.R. 6812. Providing Federal Old Age and Survivors Insurance for Lawyers, among others. January 29, 1954. 1954. 9 Record 130–2. David L. Benetar, chairman.

Report with recommendations on the subject of proposed amendments to the Taft-Hartley law. March 3, 1954. Mimeo. David L. Benetar, chairman. Minority report submitted by David I. Ashe and Samuel Harris Cohen.

Report with recommendations on the subject of proposed amendments to the Taft-Hartley law. June 30, 1953. Mimeo. David L. Benetar, chairman. Minority report submitted by David I. Ashe and Samuel Harris Cohen.

COMMITTEE ON LAW REFORM

Reports on:

Consideration of new methods to select judges. October 1952. George G. Gallantz, chairman.

The comparative negligence rule. (The desirability of substituting it for the present rule of contributory negligence) January 6, 1953. George G. Gallantz, chairman.

Preliminary report of the Subcommittee on Public Defender. November 9, 1953. Mimeo. A. Mark Levien, chairman.

COMMITTEE ON LEGAL AID

Report on the Public Defender Bills. May 13, 1954. Mimeo. Edward Rager.

COMMITTEE ON MUNICIPAL AFFAIRS

Report on Office of Commissioner of Investigation. 1952. 7 Record 506–9. W. Mason Smith, Jr., chairman.

COMMITTEE ON THE MUNICIPAL COURT

Report of the Committee on the Municipal Court of the City of New York. Reports. 1952–54 (Reports on Candidates).

Report on consideration of new methods to select justices of the Municipal Court. December 30, 1952. Mimeo.

COMMITTEE ON POST-ADMISSION LEGAL EDUCATION

"Germany and the New Europe." John J. McCloy, Former U. S. High Commissioner to Germany. 1952. 7 Record 480–500. Parker McCollester, chairman.

Section on Wills, Trusts, and Estates. "Clause for allocation of receipts and expenses as between principal and income," an address by Albert Mannheimer. January 7, 1953. Mimeo. Standish F. Medina, chairman.

"Problems of United States Leadership—A Practitioner's View," by Ernest A. Gross. January 13, 1953. 1953. 8 Record 106–14. Parker McCollester, chairman.

"Problems of International Air Transportation," by Warren Lee Pierson. February 10, 1953. 1953. 8 Record 151–61. Parker McCollester, chairman.

"As a Newcomer Sees the Department of Justice." By the Honorable Herbert Brownell, Jr., Attorney General of the United States. April 23, 1953. 1953. 8 Record 219–28. Parker McCollester, chairman.

Section on Trade Regulation. "The Trial of an Antitrust Case." The Honorable Gregory F. Noonan, Judge, U. S. District Court. April 30, 1953. 1953. 8 Record 392–400. Jerrold G. Van Cise, chairman of section.

Jurisprudence in action; a pleader's anthology [by] Ames [and others]. Legal essays; with a foreword by Robert H. Jackson. New York, Baker, Voorhis, 1953. 494p.

Section on Wills, Trusts, and Estates. Will contests, by Joseph T. Arenson. January 7, 1954. Mimeo. Standish F. Medina, chairman.

Section on Wills, Trusts, and Estates. "Some practical ways in which proposed internal revenue code of 1954 would affect estate planning," an address by Albert Mannheimer. May 5, 1954. Mimeo. Standish F. Medina, chairman.

Section on Wills, Trusts, and Estates. 1954 Revenue code — estate tax changes, by Albert Mannheimer. October 13, 1954. Mimeo.

Joint meeting of Section on Wills, Trusts, and Estates and Section on Taxation. Income taxation of short-term and controlled trusts. Delivered by William E. Murray. December 1, 1954. Mimeo. Albert Mannheimer and R. Palmer Baker, Jr., chairman.

"Expressing the Idea—The Essentials of Oral and Written Argument," by the Honorable Edward S. Dore. 1954. 9 Record 413–29. Orison S. Marden, chairman.

Section on Taxation. State Taxes and Practice and Procedure in the Department of Taxation and Finance. Benjamin B. Bernstein, Deputy Tax Commissioner, New York State Department of Taxation and Finance. 1954. 9 Record 106–19. R. Palmer Baker, Jr.

Section on Trade Regulation. "Recent Antitrust Developments," by Milton Handler. 1954. 9 Record 171–91. Jerrold G. Van Cise, chairman of the section.

COMMITTEE ON PROFESSIONAL ETHICS

Opinion B–192. 1952. 7 Record 461–2; Opinion B–203. 1953. 8 Record 127–31; 1954. 9 Record 133–4. James H. Halpin, chairman.

COMMITTEE ON REAL PROPERTY LAW

Report on rights of mortgagees to retain fire insurance proceeds. October 14, 1952; same, 1953. 8 Record 42–9. Albert W. Fribourg, chairman.

Memorandum re: the use of dummies in mortgage transactions. January 6, 1953. Mimeo. John P. Allee.

Proposed amendments to the Emergency-housing rent control law. January 8, 1953. Mimeo. Albert W. Fribourg, chairman.

Recommendations for amendments to the Civil practice act and the Emergency commercial and business space rent control laws. January 30, 1953. Mimeo. Albert W. Fribourg, chairman.

Memorandum in support of proposed amendment to section 144–a of the Civil practice act. January 6, 1954.

COMMITTEE ON STATE LEGISLATION

Bulletins no. 1–7, 1953; 1–7, 1954.

SPECIAL COMMITTEE ON A NEW COURTHOUSE FOR THE MUNICIPAL AND CITY COURTS

A memorandum to the Board of Estimate on the proposed City and Municipal Courts Building. September 9, 1953. Mimeo. Francis H. Horan, chairman.

SPECIAL COMMITTEE ON THE PROPOSED ZONING RESOLUTION

Report of Special Committee on the Proposed Zoning Resolution. November 17, 1953. Phillip W. Haberman, Jr., chairman. Minority report by Charles C. Weinstein, November 27, 1953, appended.

SPECIAL COMMITTEE ON THE STUDY OF THE ADMINISTRATION OF LAWS RELATING TO THE FAMILY

Public hearing held at the Association of the Bar of the City of New York, Tuesday, November 10, 1953. Mimeo.

Report. March 9, 1954. 9 Record 156–68. Allen T. Klots, chairman.

Children and families in the courts of New York City: a report by a special committee of the Association of the Bar of the City of New York, and a study by Walter Gellhorn, assisted by Jacob D. Hyman and Sidney H. Asch, on the administration of laws relating to the family in the city of New York. New York, Dodd, Mead, & Co. 1954. 403p.

SPECIAL COMMITTEE ON STUDIES AND SURVEYS OF THE ADMINISTRATION OF JUSTICE

Bad Housekeeping; the administration of the New York Courts. Foreword by Allen T. Klots. 1954. Francis H. Horan, chairman.

SPECIAL COMMITTEE ON THE UNIFICATION OF THE COURTS

Report on calendar delay in the Supreme Court. December 29, 1952. Porter R. Chandler, chairman.

YOUNG LAWYERS COMMITTEE

Inter-Law School Moot Court Competition at the House of the Association, December 17 and 18, 1953, sponsored by the Young Lawyers Committee. Records and briefs. New York, Pandick Press, 1953–54.

BENJAMIN N. CARDOZO LECTURES

Parker, John J., Chief Judge, U. S. Court of Appeals, Fourth Circuit. The American Constitution and World Order Based on Law. The Twelfth Annual Benjamin N. Cardozo Lecture. May 7, 1953. 1953. 8 Record 267–85. Also issued separately.

Peck, David W., Presiding Justice of the Appellate Division, Supreme Court, First Department. The Complement of Court and Counsel. The Thirteenth Annual Benjamin N. Cardozo Lecture. April 22, 1954. 1954. 9 Record 272–86. Also issued separately.

COMMITTEE ON TAXATION

Report on proposals as to changes in the federal income and gift tax laws and as to relieving the congestion of the tax court docket. April, 1953.

Report of the Committee on proposed revision of section 162 of the internal revenue code. February, 1954. Mimeo. John H. Alexander, chairman.

Report on H.R. 8300. 1st–2d. April 8, 16, 1954. John H. Alexander, chairman.

COMMITTEE ON TRADE REGULATION AND TRADE-MARKS

Report on the proposal of the Federal Trade Commission to incorporate in Section II of the Clayton act the same provisions for finality and review of orders, and the same penalty provisions now contained in the Federal Trade Commission Act. May 12, 1953. Mimeo. Breck P. McAllister, chairman.

Report on H.R. 4597, 83rd Congress, 1st Session. "To amend Section 4 of the Clayton act to provide for discretionary treble damages in private actions under the antitrust laws." May 28, 1953. Mimeo.

COMMITTEE ON UNIFORM STATE LAWS

Report on the proposed uniform commercial code. January 20, 1953. W. Hugh Peal, chairman.

Acting jointly with the Special Committee on the Uniform Commercial Code of the New York State Bar Association. Report on the proposed uniform commercial code. January, 1954. 1954. 9 Record 67–71. W. Hugh Peal, chairman.

COMMITTEE TO COOPERATE WITH THE INTERNATIONAL COMMISSION OF JURISTS AT THE HAGUE

Lawyers and the cold war in cooperation with the International Commission of Jurists. May 4, 1953. Mimeo.

SPECIAL ADVISORY BAR COMMITTEE TO STUDY THE PROBLEM OF CONTINGENT FEES

Report. October 1952.

SPECIAL COMMITTEE ON COURTHOUSES AND COURTROOMS

Committees on the City Court of the City of New York, the Municipal Court of the City of New York, and the Special Committee on Courthouses and Courtrooms. A memorandum to the City Planning Commission on the Proposed City and Municipal Courts Building. 1952. 7 Record 399–402. Prepared by Whitney North Seymour, Jr.

SPECIAL COMMITTEE ON IMPROVEMENT OF THE DIVORCE LAWS

Statement of Richard H. Wels, chairman of the Special Committee on Improvement of Family Law of the Association of the Bar of the City of New York, before the Assembly Ways and Means Committee, March 5, 1953, in support of the Gordon Bill. March 5, 1953.

FORUMS AND LECTURES

Child Care Facilities Available to the Domestic Relations Court. The Honorable Justine Wise Polier, Justice, Domestic Relations Court; Raymond M. Hilliard, Executive Director, Welfare and Health Council; John J. Murphy, Executive Director, Children's Center, New York City Department of Welfare. Sponsored by the Committee on the Domestic Relations Court, Henry G. Hotchkiss, chairman. May 5, 1952. 1953. 8 Record 15–29.

Judges for Children. Mrs. Eleanor Roosevelt, The Honorable John Warren Hill, Professor Walter Gellhorn, and Dr. Alfred J. Kahn. Symposium before the Committee on the Domestic Relations Court. Mrs. Sylvia Jaffin Singer, chairman. April 29, 1953. 1954. 9 Record 8–19.

Pre-Trial Discovery in an Antitrust Case, by The Honorable Robert McCurdy Marsh, Former Justice, Supreme Court, First Judicial District. 1953. 8 Record 401–12.

The Relationship of the Securities and Exchange Commission to the Congress and the Securities Industry. J. Sinclair Armstrong, Commissioner, Securities and Exchange Commission. December 6, 1954.

MEMORIAL BOOK 1952–1953

YEAR BOOK 1952–1953